Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CITY OF FAIRFIELD, OHIO ET AL. PETITIONERS

v.

LYNN D. TUCKER, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR ~~A WRIT OF~~ CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where an ordinance prohibiting "structures" in public right-of-ways is content-neutral and promotes substantial government interests which are achieved less effectively absent the regulation, can the court of appeals nevertheless find that it is not narrowly tailored under *Ward v. Rock Against Racism*, 491 U.S. 781(1989) because the expressive conduct it prohibits is in the public right-of-way for only a short period of time and "can be easily removed?"

2. Has the court of appeals made more rigorous than constitutionally required *Ward's* time, place or manner analysis for determining whether a content-neutral ordinance is narrowly tailored when it decided for itself that the Union's expressive activity in the public right-of-way did not present "any adverse effects" for motorists or pedestrians, did not diminish the aesthetics of this public forum, was merely "temporary" and could be "easily removed?"

3. Does *Ward's* narrow tailoring analysis allow a reviewing court to excuse the Union's violation of a content-neutral ordinance furthering substantial government interests because that court could imagine circumstances under which the Union's expressive conduct in the public right-of-way might not derogate from the legitimate government concerns which caused the City to enact the ordinance in the first place?

PARTIES TO THE PROCEEDING

CITY OF FAIRFIELD, Ohio; KEVIN HADDIX, in his Individual Capacity; JANETTE MATALA, In her individual capacity City of Fairfield Zoning Inspector; JOHN DOES(S) 2-5, in their individual capacities, PETITIONERS

LYNN D. TUCKER, JR., General Vice President, International Association of Machinists and Aerospace Workers; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 34, RESPONDENTS

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CITATIONS OF OPINIONS AND ORDERS.

The published opinion of the Court of Appeals for the Sixth Circuit in *Lynn D. Tucker, Jr. et al. v. City of Fairfield, Ohio et al.*, 398 F.3d 457(C.A. No. 03-4508), decided and filed February 11, 2005, affirming the District Court's order granting the Respondents a preliminary injunction, is set forth in the Appendix hereto(App. 1-23).

The unpublished Memorandum and Order of the United States District Court for the Southern District of Ohio, Western Division, in *Lynn D. Tucker, Jr. et al. v. City of Fairfield, Ohio et al.*(Civil Action No. C-1-03-607), dated October 27, 2003, granting the Respondents' motion for a preliminary injunction, is set forth in the Appendix hereto(App. 24-38).

The unpublished order of the Court of Appeals for the Sixth Circuit in *Lynn D. Tucker, Jr. et al. v. City of Fairfield, Ohio et al.*, C.A. No. 03-4508, filed April 28, 2005, denying the Petitioners' timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 39).

The full text of the City's Ordinance No. 155-03, amending Section 905.03(c) of the Fairfield City Code, dated September 13, 2003, is set forth in the Appendix hereto(App . 40-45).

BASIS FOR JURISDICTION IN THIS COURT.

The decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's granting of the Respondents' motion for a preliminary

injunction was entered on February 11, 2005; and its order denying the Petitioners' timely filed petition for rehearing *en banc* was filed on April 28, 2005(App.1;39).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the Petitioners' timely filed petition for rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law...abridging the freedom of speech.

United States Constitution, Amendment XIV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law....

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. Section 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE.

The Respondent Lynn D. Tucker, Jr. ("Tucker") is the General Vice President of the International

Association of Machinists and Aerospace Workers, Eastern Regional Office; and the Respondent International Association of Machinists and Aerospace Workers, Lodge No. 34 ("the Union") is a duly organized labor group located in Cincinnati, Ohio(App. 25).

On three separate days, February 26, 2003, July 1, 2003, and July 31, 2003, Tucker and several of the Union's members picketed within the public right-of-way adjacent to Fairfield Ford, a car dealership located at 5221 Dixie Highway within the municipal limits of the Petitioner City of Fairfield, Ohio("the City")(App. 2;25-26). There were 25 to 40 protesters at each demonstration which all took place in the public right-of-way between Dixie Highway and Fairfield Ford. Each of these demonstrations lasted between one and two hours.

While protesting Fairfield Ford's alleged unfair labor practice of refusing to negotiate with the Union, on each occasion the Union members carried picket signs and deployed in the public right-of-way an inflatable rat balloon measuring approximately twelve (12) feet high and eight (8) feet wide. The rat balloon was placed on a tarp, inflated using a generator and internal fan and then secured to the ground with tent stakes or tethers so that it would not tip over. The rat balloon remained in a stationary location, staked in the right-of-way, during the course of each of the Union's demonstrations in front of Fairfield Ford.

Once the demonstration concluded, Union members turn off the generator, disconnect the fan, deflate the balloon, pull the tethers out of the ground and then remove the rat balloon from the public right-of-way. Each procedure for deploying and later removing the rat

balloon in the public right-of-way takes between five to ten minutes.

At the time of these Union demonstrations in front of Fairfield Ford, the City had in force its Ordinance 905.03 of the Fairfield City Code which governs the use of public streets, alleys and grounds. Subsection (c) of this Ordinance provided:

> No person, firm, or corporation shall construct or place or cause the construction or placement of any shrubbery, trees, parking facilities *or any other structure* or improvement, other than approved street trees and mailboxes, on any street, alley, public right or [sic] way, easement or public grounds without the written permission of the [City's] Public Works Director.

(App. 27)(emphasis supplied). As originally enacted, Ordinance 905.03 defined a "structure" as

> anything constructed, the use of which requires permanent location on the ground or attachment to something having permanent location on the ground, and also includes anything constructed which is not enclosed within another structure and is placed in a stationary location.

(App. 27).

The Union notified the City's Police Department about its demonstration on February 26, 2003, and its intention to use the rat balloon. Although the City's police officers arrived at the demonstration after Fairfield Ford complained about the activity in front of its business, they

made no arrests and issued no citations because of the Union's use of the rat balloon.

Prior to its second demonstration at Fairfield Ford on July 1, 2003, the Union once again notified the City's Police Department of this event. During the demonstration which again included the deployment of the rat balloon in the public right-of-way between Dixie Highway and Fairfield Ford, the City's zoning inspector (the Petitioner Janette Matala) arrived at the scene and informed the Union protestors that they would have to remove the rat balloon from its location. Thereafter, the City's police officers arrived and warned the demonstrators that they would be arrested if they did not take down the rat balloon. The Union members thereafter deflated the rat balloon.

The third demonstration by the Union at Fairfield Ford took place on July 31, 2003. During this demonstration, Tucker and the Union again deployed the rat balloon in the public right-of-way between Dixie Highway and Fairfield Ford. The City's police officers arrived at the scene and after Tucker refused to remove the rat balloon immediately, they issued him a citation with summons for violating Section 905.03 of the Fairfield City Code. The citation charged Tucker with having engaged in unlawful "construction on Streets/Alleys/Right of Way...Easements, or Public Grounds."

In the wake of these events, Tucker and the Union brought this civil action on August 27, 2003, in the District Court for the Southern District of Ohio against the City, its zoning inspector Matala, and Lieutenant Kevin Haddix of the City's Police Department, seeking a

temporary restraining order, a preliminary injunction and damages as the result the City's enforcement of Section 905.03 against them. Positing jurisdiction on 42 U.S.C. Section 1983, they claimed that the rat balloon was not a "structure" within the meaning of the Ordinance and that City had violated their First Amendment rights as well as their civil rights in applying the Ordinance against them.

Tucker and the Union requested the entry of a temporary restraining order and then a preliminary injunction which prevented the City and its employees from further interfering with its deployment of the rat balloon at their demonstrations; a judgment declaring that the display of the rat balloon in the public right-of-way between Dixie Highway and Fairfield Ford is protected speech under the First Amendment and Section 7 of the National Labor Relations Act, 29 U.S.C. Section 157; and an award of damages for the violation of their civil rights together with attorney's fees.

On August 29, 2003, the District Court, Beckwith, J., issued a temporary restraining order consistent with the request of Tucker and the Union, one which expired on September 15, 2003, the day of its hearing on their request for a preliminary injunction. On September 13, 2003, two days before the hearing in the District Court on the preliminary injunction, the City Council of Fairfield met in special session and revised Ordinance 905.03 of the City Code by amending its definition of "structure" as used in the Ordinance to mean

> any object, whether permanent or temporary, including, but not limited to, non-public signs, that is constructed, erected or placed in a stationary location on the ground or is attached to or placed

> upon an object constructed, erected or placed in a stationary location on the ground. This definition does not include motor vehicles. However, non-motor vehicles objects attached to or placed upon motor vehicles are themselves placed in a stationary location are included.

(App. 39-45).

The City Council's preamble to this enactment determined that the City has a substantial government interest in promoting public safety in the use of public rights-of-way by ensuring the smooth and safe flow of pedestrian and street traffic and in furthering the aesthetic appeal of and preventing visual blight in its public rights-of-way(App. 41). It also made specific reference to this litigation between Tucker, the Union and the City, and the right of a municipality to "restrict the placement of objects, including, but not limited to, non-public signs, in the public rights-of-way under the holding of the United States Supreme Court in the case of *Members of the City Council of the City of Los Angeles et al. v. Taxpayers for Vincent et al.*, 466 U.S. 789(1984) and as stated in the case of *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341(7th Cir. 1990)"(App. 40-41).

The hearing on the preliminary injunction went forward on September 15, 2003. On October 27, 2003, the District Judge granted the motion for a preliminary injunction in a written decision which found, among other things, that Tucker and the Union had demonstrated a likelihood of success on their claim that the City's actions preventing their deployment of the rat balloon in the public right-of-way between Dixie Highway and Fairfield

Ford violated their First Amendment rights(App. 24-38).

Upon the City' appeal, the Court of Appeals for the Sixth Circuit in a majority opinion affirmed Judge Beckwith's ruling granting the preliminary injunction(App. 1-23). It first concluded that the District Judge did not abuse her discretion in finding that the Union's use of the "portable" rat balloon on the public right-of-way is deserving of First Amendment protection. The majority reasoned that "[u]nlike the more permanent structures analyzed in *Graff* [*v. City Chicago*, 9 F.3d 1309(7th Cir. 1993)(*en banc*)(newsstands)] and *Lubavitch*,[*supra*(menorah)], the balloon in the instant case is temporary and easily movable"(App. 7-8). Moreover, the Union uses the balloon only during its protests, which last just one to two hours; and "the balloon has not been shown to cause any danger that could justify restriction of the balloon's use"(App. 8). As it earlier found, "there is no evidence on this record indicating that the protests, including the use of the balloon, created any obstruction or safety hazard"(App. 4).

Having concluded that the Union's use of the rat balloon in a public right-of-way is constitutionally protected expression, the majority turned to the question of whether the City may nevertheless prohibit Tucker and the Union from deploying it in the public right-of-way during their protests(App. 8-11). Because the area where the rat balloon was displayed implicated streets and sidewalks, traditional public fora, the City could enforce content-neutral time, place or manner regulations only if they were "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (App. 9-10 quoting *Perry*

Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45(1983)).

Since Ordinance 905.03(c) of the City Code was not a content-based restriction on speech, the majority analyzed the question under this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781, 799(1989), which cautions that the requirement of narrow tailoring is satisfied "so long as the...regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" and does not "burden substantially more speech than is necessary to further the government's legitimate interest"(App. 9-11). Employing this analysis, the majority ruled that the Ordinance was not narrowly tailored as applied to the Union's use of the rat balloon(App. 10).

It concluded:

> [i]n our view, the asserted government interests of keeping the public right-of-way clear and preserving the aesthetics of the community, while generally considered substantial, are simply not achieved any less successfully absent the application of the ordinance in this case. *There is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right-of-way has any adverse effects, such as obstruction of pedestrian or automobile traffic.* By applying the ordinance to prohibit the *temporary* use of the balloon in this case, it therefore appears that the City has applied its ordinance in a manner that is "substantially broader than necessary to achieve its interests."

(App. 10)(emphasis supplied). The majority accordingly agreed with the District Judge that Tucker and the Union had demonstrated a likelihood of success on the merits of their complaint, warranting the entry of a preliminary injunction(App. 11-12).

Circuit Judge Kennedy dissented from this ruling(App. 12-23). She would have found that Tucker and the Union were unlikely to succeed on the merits; that the District Judge improperly applied the law; and that none of the considerations for the entry of a preliminary injunction (e.g., irreparable harm, harm to others and to the public's interest) justified this equitable relief(App. 12-13).

Judge Kennedy agreed with the majority that the rat balloon is speech and is a "structure" under either version of the City's ordinances(App. 13-15). She also agreed that the right-of-way where the rat balloon was erected is "akin to a sidewalk;" and that this Court's time, place or manner analysis is the appropriate framework for reviewing the ordinance as applied to the rat balloon(App. 15). In applying this analysis, she found like the majority that the City's ordinance is content-neutral and that the City has a substantial government interest in keeping its right-of-ways clear to further public safety, permit pedestrian passage and preserve the aesthetics of the community (App. 15-16).

However, Judge Kennedy disagreed with the majority's view that the ordinance was not narrowly tailored to serve these substantial government interests(App. 16-20). Relying upon this Court's decision in *Ward* that a regulation is narrowly tailored, even if it could be accomplished by some less-speech-restrictive

alternative, as long as it promotes a substantial government interest which would be achieved less effectively absent the regulation, she reasoned that this "narrowly tailored" test is a far more lenient one than a least restrictive means test and that some amount of "over inclusiveness is permissible provided that the evil targeted by the statute is permissible"(App. 17).

According to the dissent, this test requires that the court *first* look to the government's significant interests and then determine whether the ordinance narrowly targets the identified evil, *regardless of the speech it affects*(App.18;19-20). Instead of doing so, the majority (and the District Judge) investigated first the nature of the structure, the fact that the rat balloon was deployed in the right-of-way for just one or two hours, was not "permanent," and had not (yet) caused any danger or safety hazard(App. 4;8;10). Judge Kennedy thought this assessment was "an incorrect mode of analysis" because the narrow tailoring test is *not* a balancing test dependent upon the value of the speech affected by the ordinance but rather a straightforward inquiry, regardless of the value which a court may assign the speech, of whether the ordinance serves a significant government interest and whether it is narrowly tailored to address that interest(App. 17-18).

> To make every government regulation of speech subject to such a balancing test, the dissent contended, would make the narrow tailoring portion of the time, place or manner analysis much more rigorous than it is and arbitrary in its application, giving judges the right to second guess legislatures by balancing the identified interest against the value of the speech(App. 18-

> 19). "So long as, in general, the City has a significant government interest, and so long as the ordinance is narrowly tailored to serve that interest, as is the case here, it should not matter what type of speech is affected by the ordinance....We should evaluate an ordinance's narrow tailoring only in relation to the identified significant government interest and not in relation to the speech it affects"(App. 19-20).

Employing this approach, Judge Kennedy concluded:

> [g]iven that the interest here is keeping the right-of-way clear, an outright ban on structures is a reasonably narrow means of serving that interest. The right-of-way is blocked by a structure regardless of whether that structure is present for one hour or for one year. Part of the public safety rationale that forms the basis for keeping the right-of-way clear likely involves allowing emergency vehicles free access to it in the event of a problem. *If a structure is present in the right-of-way for any period of time, that significant interest is diminished.* While it is true that a structure present for two hours diminishes the interest less than would a structure present for a much longer time, all that the City needs to show in order to prove narrow tailoring is that the evil targeted is remedied by the ordinance in a manner that is not over inclusive. I believe the ordinance in this case meets that standard and is, therefore, narrowly tailored to serve the significant interest.

(App. 20)(emphasis supplied). She also found that the

City's significant interest in preserving the aesthetics of the community was diminished "the moment a structure is constructed in the right-of-way"(App. 23).

The dissent finally determined that there were readily available alternative channels for communication here(App. 20-21). Instead of being tethered to a stationary position in the public right-of-way, the rat balloon could have been "moved around," on a cart or otherwise; the Union could have made signs with pictures of the rat; it could have passed out smaller rat balloons to passers-by; or used many other methods to communicate its message(App.21).

Finding an abuse of discretion by the lower court in granting the preliminary injunction, Judge Kennedy would have reversed its ruling and remanded the matter for further proceedings (App. 21-22).

On April 28, 2005, the Court of Appeals for the Sixth Circuit denied the City's timely filed petition for rehearing *en banc*(App. 39).

The City has now brought to this Court its petition seeking a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT.

The Decision Below Dramatically Misapplies This Court's Time, Place Or Manner Analysis For Determining Whether The City's Ordinance Is Narrowly Tailored To Promote Substantial Government Interests.

Tucker and the Union brought their complaint claiming that Ordinance 905.03(c) of the City Code, as applied to their use of the large rat balloon in the public right-of-way, violated their First Amendment rights(App. 4;24). An as-applied challenge to the Ordinance contends that the law is unconstitutional as applied to their particular speech activity, even though the law may be capable of valid application to others. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n. 22(1984). While an as-applied challenge depends on the concrete facts of this particular case and, if successful, does not render the law invalid as to third parties not before the Court, if the City's Ordinance cannot be validly applied to the Union's conduct here, it cannot be validly applied to the same or similar conduct in the City's public rights-of-way undertaken by third parties in the future. *Id.* at 802-803.

Under principles repeatedly enunciated by this Court for assessing the City's right to regulate the Union's activity here, the first inquiry is whether the Union's expressive conduct is deserving of First Amendment protection. There is no doubt that the Union's peaceful picketing, protesting and demonstrating in a public place incident to a private labor dispute with Fairfield Ford is within the ambit of First Amendment

protection. *Hill v. Colorado*, 530 U.S. 703, 722 & n.30(2000). *United States v. Grace*, 461 U.S. 171, 176-177(1983). *Carey v. Brown*, 447 U.S. 455, 460-462(1980). *Edwards v. South Carolina*, 372 U.S. 229, 235(1963). *Thornhill v. Alabama*, 310 U.S. 88, 101-103(1940).

However, this Court has made clear that even though picketing and demonstration on public property is First Amendment activity, it may nonetheless be regulated by the government and is subject to the same content-based and content-neutral tests that apply to other forms of expressive activity. *Hill v. Colorado, supra*, 530 U.S. at 722 n. 30. *Cameron v. Johnson*, 390 U.S. 611, 612 n.1; 617(1968). *United States v. Grace*, 461 U.S. at 181;183-184. *Cox v. Louisiana*, 379 U.S. 559, 563(1965). This flows from the principle that no person or group wishing to propagandize their views has a constitutional right to do so whenever, however and wherever it pleases. *United States v. Grace*, 461 U.S. at 177-178 quoting *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 799-800(1985).

Recognizing that the City, "no less than a private owner of property, has power to preserve the property under its control for the use for which it is lawfully dedicated," *United States v. Grace*, 461 U.S. at 178 quoting *Adderley v. Florida*, 385 U.S. at 47, this Court has adopted a forum analysis as a means of determining when the government's interest in limiting the use of its

property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.

The public streets and right-of-ways of the City where the Union activity occurred and where the rat balloon was inflated and then tethered to the ground are the "archetype[s] of...traditional public for[a]." *Frisby v. Schultz*, 487 U.S. 474, 480-481(1988). *Boos v. Barry*, 485 U.S. 312, 318(1988). *Hague v. CIO*, 307 U.S. 496, 515(1939). In these public fora, the government may not prohibit all communicative activity. *United States v. Grace*, 461 U.S. at 177. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45(1983). The appropriate level of scrutiny given the City's regulation of speech in these fora hinges on whether the Ordinance distinguishes between prohibited and permitted speech on the basis of its content. *Frisby v. Schultz*, 487 U.S. at 481.

If the Ordinance contains a content-based exclusion, the City must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, *supra*. *Carey v. Brown*, 447 U.S. at 461. On the other hand, if the Ordinance is content-neutral, it is subject to a less stringent, "intermediate level" of scrutiny and it may regulate speech if it contains reasonable time, place or manner restrictions, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *Bartnicki v. Vopper*, 532 U.S. 514, 545(2001). *Frisby*, 487 U.S. at 482. *United States v. Grace*, 461 U.S. at 177. *Perry*, 460 U.S. at 45. See *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 175 (2002)(Rehnquist, C.J., dissenting).

To be content-neutral, the Ordinance must regulate speech for government purposes unrelated to the content of the ideas or views expressed. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643(1994). *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763(1994). *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n. 22(1984). *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649(1981). The government's purpose is the controlling consideration. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293(1984). *Heffron*, 452 U.S. at 648. Thus a regulation that serves government purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-792(1989).

Measured by this standard, Ordinance 905.03(c) of the City Code is content-neutral. It prohibits the presence of any "structure" in a public right-of-way other than approved street trees and mailboxes. There is "not even a hint of bias or censorship" towards expressive conduct in the City's enactment of the Ordinance; and there is no claim that the Ordinance was designed to suppress certain ideas that the City finds distasteful. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 805. The text of the Ordinance itself is silent concerning any speaker's point of view and the District Judge found that this was a content-neutral time, place and manner restriction(App. 30-31). See *id.*; *Clark v. Community for Creative Non-Violence*, 468 U.S. at 295.

Moreover, the purposes asserted by the City for its enactment and enforcement of Ordinance 905.03(c) go to the very heart of its duties as a trustee of the public

welfare. Promoting the safe passage of emergency and other vehicles, unhindered access for pedestrian traffic and aesthetics all have been recognized by this Court as legitimate government purposes justifying the regulation of speech in public fora. *See, e.g., Madsen v. Women's Health Center, Inc.*, 512 U.S. at 768(the government has a strong interest in ensuring public safety and order "in promoting the free flow of traffic on public streets and sidewalks..."); *Members of City Council v. Taxpayers for Vincent, supra*(aesthetics); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (aesthetics); *Schneider v. State*, 308 U.S. 147, 160(1939)("[M]unicipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for the movement of people and property, the primary purpose to which streets are dedicated.").

Given that the Union was engaging in First Amendment activity when it inflated and then staked the large rat balloon to the ground in a public right-of-way; that the Union was then subject to the content-neutral provisions of Ordinance 905.03(c) of the City Code; and that in enforcing this Ordinance against Tucker and the Union, the City was furthering the significant government purposes of promoting the safe passage of emergency and other vehicles, unhindered access for pedestrian traffic and aesthetics, it remained to be considered whether this content-neutral time, place or manner restriction was narrowly tailored to serve a significant government interest and whether it leaves open ample alternative channels of communication.

In *Ward v. Rock Against Racism, supra*, this Court, building upon its prior decisions which had employed the narrow tailoring analysis, clarified and

reaffirmed the approach which should be taken. Specifically, the *Ward* Court, speaking through Justice Kennedy, wrote:

> [l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that *it need not be the least restrictive means of doing so.* Rather, the requirement of narrow tailoring is satisfied "so long as the...regulation *promotes a substantial government interest that would be achieved less effectively absent the regulation.*"... To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals....So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method of promoting significant government interests" or the degree to which those interests should be promoted.

491 U.S. at 798-800 quoting *United States v. Albertini*, 472

U.S. 675, 689(1985) and *Clark v. Community for Creative Non-Violence*, 468 U.S. at 297;299(emphasis supplied) (footnotes omitted).

Under *Ward's* narrow tailoring inquiry, given that the City has a substantial interest in keeping its right-of-ways clear for public safety, pedestrian traffic and aesthetic purposes, Ordinance 905.03(c) of the City Code prohibiting "structures" in public right-of-ways is sufficiently tailored where it is shown that without this regulation those substantial government interests will be achieved less effectively. Even if not a perfect fit, this nexus between the City's regulation and the effect it has on accomplishing the City's legitimate substantial interests gives the ordinance the tailoring it needs to survive a challenge when it impinges incidentally on protected speech.

By requiring that the Ordinance be targeted to accomplish important values the City is obligated to protect, *Ward's* narrow tailoring test emphasizes that an ordinance will *not* be invalidated "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive analysis." In this sense, the *Ward* test focuses first on the substantial government interests involved and then asks whether the regulation furthers those interests. If it does, and if it does not substantially burden more speech than necessary, it is narrowly tailored and this portion of the Court's time, place or manner analysis will uphold the Ordinance's constitutional validity even if it incidentally impinges on expressive activity.

As this Court has held, even a *complete ban* on expressive activity can be narrowly tailored but only if

each activity within the proscription's scope is an appropriately targeted evil. *Frisby v. Schultz*, 487 U.S. at 485. In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 809-810, this Court upheld an ordinance which banned all signs on public property because the interest supporting the regulation, an aesthetic concern for avoiding visual clutter and blight, rendered each sign an evil. *Id.* The complete prohibition of signs was justified because the "substantive evil—visual blight—[was] not merely the possible byproduct of the activity, *but [was] created by the medium of expression itself.*" *Id.* at 810(emphasis supplied).

Similarly, in *Frisby v. Schultz*, 487 U.S. at 485-487, this Court found narrowly tailored an ordinance's complete ban of focused picketing at particular homes in residential areas because it did not prohibit *public* picketing but rather the kind of offensive private picketing targeted at particular individuals in their homes; and the government had a legitimate interest, i.e., providing residential privacy for its citizens, which justified the ban. *Id.* at 486. Again, the substantive evil, targeted residential picketing of particular persons in their own homes, was "created by the medium of expression itself." *Id.* at 487 quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 810.

The same is true here. The substantive evil targeted by the Ordinance's complete ban of "structures" in public right-of-ways—obstructed public ways, impassable sidewalks or cluttered grassy areas—is not merely a possible by-product of the Union's activity of inflating and staking the large rat balloon in the public right-of-way during its demonstrations, *but rather is created by the Union's medium of expression itself.* The

application of the Ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. As in *Ward*, *Taxpayers for Vincent* and *Frisby*, the Ordinance here curtails no more speech than is necessary to accomplish its purposes and is narrowly tailored under *Ward's* rationale. Contrast *Schneider v. State*, 308 U.S. at 162-163(anti-littering statute held invalid because it could have addressed the substantive evil of littering without prohibiting expressive activity of handbilling and right to communicate directly with a willing listener).

Instead of employing this analysis under *Ward*, *Taxpayers for Vincent* and *Frisby* to find that the Ordinance was narrowly tailored and therefore enforceable, the District Court excused the Union's rat balloon from the Ordinance's proscription because although staked and tethered in a public right-of-way, it was not obstructive, was only there for a limited period of time, could be removed "easily" from the right-of-way and was "portable"(App. 31;35). A majority of the court of appeals concurred with this analysis finding that "there is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right-of-way has any adverse effects, such as obstruction of pedestrian or automobile traffic"(App. 4;10).

Nothing in *Ward* or any other decision of this Court justifies this extended narrow tailoring analysis. Once the determination is made that the regulation furthers substantial government interests, as here, and that it does not substantially burden more speech than necessary, as here, it is a narrowly tailored regulation and this narrowly tailored portion of the Court's time, place or manner analysis has been satisfied *even if it*

incidentally impinges on expressive activity. To extend the calculus by rationalizing that the Union's expressive conduct in the public right-of-way is benign, time-limited and non-obstructive is to require the City to perform the impossible task of tailoring its regulations to prohibit structures in public right-of-ways *only* where these structures would immediately or most certainly interfere with the function of roadways, sidewalks and grassy areas.

The lower courts' extended analyses defy common sense. How can the court of appeals—or any court—know that the Union's rat balloon, once anchored in the public right-of-way in violation of the Ordinance, will not obstruct the City's roadways, sidewalks or grassy area and *never* present a hazard? How can it reason that even if temporary, it will not while anchored in the public right-of-way intimidate pedestrians, distract or impede passing motorists and emergency vehicles or diminish the aesthetics of the public area? To even engage in such a calculus which makes the violation dependent on guesses about the extent or nature of the found violation runs afoul of this Court's clear statement in *Ward* that a regulation "need not be the least restrictive or least-intrusive means" of serving the City's legitimate public interests. There simply is no room in *Ward's* analysis for making these distinctions, ones which the City, as trustee of the common weal, could not afford to make when it enacted this ordinance.

None of the other considerations identified by the lower courts for excusing the Union's activity from proscription under the Ordinance is relevant under *Ward*. It does not matter for how long or in what manner the violation occurs; the fact remains that a violation of the

Ordinance has taken place. That the rat balloon is sometimes "portable" or easily removed from the public right-of-way does disturb the fact that *it is stationary and in the public right-of-way while it is placed there in violation of the Ordinance, invoking all of the legitimate government concerns which led to the Ordinance's enactment.* With a narrowly tailored regulation such as this which incidentally affects speech in furtherance of legitimate government purposes, it is enough for its enforcement that a violation has, in fact, occurred—and it is "beside the point" that the Union's rat balloon represents merely a "transitory" violation. See *Ward*, 491 U.S. at 801.

Nor can Tucker and the Union argue that allowing an exception in this particular case will not threaten the City's important government interests. This Court has repeatedly held that the validity of a regulation which incidentally affects speech is not judged solely by the demonstration at hand; "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward, supra. United States v. Albertini*, 472 U.S. at 688-689("Regulations that burden speech incidentally...must be evaluated in terms of their general effect."). *Clark v. Community for Creative Non-Violence*, 468 U.S. at 296-297. *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. at 652-653.

"The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be

promoted." *Ward*, 491 U.S. at 800. If the Ordinance's prohibition of "structures" in public right-of-ways is invalidated when applied to those structures which are placed there only "temporarily" or to those which can be "easily removed," there will be other individuals or groups who will demand similar rights and claim that their "temporary" use of the City's right-of-ways has already been sanctioned by the federal courts, thereby inviting "widespread disorder" on the City's streets and right-of-ways. See *Clark v. Community for Creative Non-Violence*, 468 U.S. at 297; *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. at 653.

This result does not square with *Ward's* wise analysis that once it is determined that the Ordinance furthers substantial government interests and does not substantially burden more speech than is necessary, it is a narrowly tailored regulation which is constitutionally enforceable even if it incidentally impinges on expressive activity.

Finally, addressing whether the Ordinance leaves open ample alternative channels of communication, an adequate alternative does *not* have to be the speaker's first choice. *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. at 647. As Judge Kennedy in her dissent determined, there were readily available alternative channels for communication here(App. 20-21). Instead of being tethered to a stationary position in the public right-of-way, the rat balloon could have been "moved around," on a cart or otherwise; the Union could have made signs with pictures of the rat; it could have passed out smaller rat balloons to passers-by; or used many other methods to communicate its message(App.21).

Having satisfied every prong of *Ward's* analysis, the City is entitled to enforce the content-neutral provisions of Ordinance 905.03(c) of the City Code whenever any "structure," including the Union's rat balloon, is placed in the public right-of-way, regardless of the time which it remains there, regardless of whether it can be "easily removed," and regardless of whether it obstructs vehicular or pedestrian traffic while it is placed in the public right-of-way. The lower courts' conclusions to the contrary misapply and undercut *Ward*, justifying the grant of the City's petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit.

CONCLUSION.

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit and, ultimately, to vacate the preliminary injunction entered below and declare that Ordinance 905.03(c) of the City Code, as presently applied by the City to the activities of Tucker and the Union, is constitutional; to remand the matter to the District Court for further proceedings; or to provide the Petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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No. 03-4508

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LYNN D. TUCKER, JR., et al.,
Plaintiffs-Appellees,

v.

CITY OF FAIRFIELD, OHIO, et al.,
Defendants-Appellants.

December 9, 2004, Argued
February 11, 2005, Decided
February 11, 2005, Filed

COUNSEL: ARGUED: John H. Clemmons, MILLIKIN & FITTON, Fairfield, Ohio, for Appellants.

David M. Cook, LAW OFFICE OF DAVID M. COOK, Cincinnati, Ohio, for Appellees.

ON BRIEF: John H. Clemmons, Thomas A. Dierling, MILLIKIN & FITTON, Fairfield, Ohio, Wilson G. Weisenfelder, Jr., Laura I. Munson, RENDIGS, FRY, KIELY & DENNIS, Cincinnati, Ohio, for Appellants.

David M. Cook, Robert E. Rickey, Stephen A. Simon, LAW OFFICE OF DAVID M. COOK, Cincinnati, Ohio, for Appellees.

JUDGES: Before: KENNEDY, MARTIN, and MOORE, Circuit Judges. MARTIN, J., delivered the opinion of the court, in which MOORE, J., joined.

KENNEDY, J., delivered a separate dissenting opinion.

OPINIONBY: BOYCE F. MARTIN, JR.

OPINION: BOYCE F. MARTIN, JR., Circuit Judge. The City of Fairfield appeals the district court's grant of a preliminary injunction prohibiting the City on First Amendment grounds from enforcing a municipal ordinance against Lynn Tucker, Jr. and other members of his union in their use of a rat balloon as part of demonstrations in a public right-of-way. For the following reasons, we AFFIRM the judgment of the district court.

I.

Lynn Tucker, Jr. is the General Vice President of the Eastern Regional Office of the International Association of Machinists and Aerospace Workers. Tucker and several of his fellow union members picketed Fairfield Ford, a car dealership in Fairfield, Ohio, on three primary occasions in 2003 (February 26, July 1, and July 31) for alleged unfair labor practices. The protests all took place in the public right-of-way between Fairfield Ford and Dixie Highway, with each involving somewhere between twenty-five and forty protesters and generally lasting between one and two hours.

During these protests, Tucker and his colleagues held signs and displayed an inflatable rat balloon measuring approximately twelve feet high and eight feet in diameter. The rat has long been used as a symbol of efforts to protest unfair labor practices. The rat balloon

in the instant case can be inflated or deflated within five to ten minutes, and is temporarily secured to the ground with stakes to ensure that it does not tip over.

The conflict in this case arises out of the application of the City's ordinance prohibiting structures in the public right-of-way to the Union's use of the rat balloon. Section 905.03(c) of the municipal code provides that "no person, firm or corporation shall construct or place or cause the construction or placement of any . . . structure or improvement . . . on any street, alley, public right-of-way, easement or public grounds without the written permission of the Public Works Director." As originally enacted, the ordinance defined "structure" as "anything constructed, the use of which requires permanent location on the ground or attachment to something having permanent location on the ground, and also includes anything constructed which is not enclosed within another structure and is placed in a stationary location." The City later amended the definition of "structure" on September 13, 2003, with the express intent of covering the use of the balloon in this case. n1 The amendment defined a "structure" in relevant part as "any object, whether permanent or temporary, including, but not limited to, non-public signs, that is constructed, erected or placed in a stationary location on the ground or is attached to or placed upon an object constructed, erected, or placed in a stationary location on the ground."

The first demonstration using the rat balloon in front of Fairfield Ford occurred on February 26, 2003. While the Union notified the police that they would be using the balloon during its protest, and Fairfield Ford called the police to complain about the demonstration, no

arrests were made or citations issued over the use of the balloon. The second demonstration occurred on July 1 at the same location. The Union again notified the police of its plans to protest. This time, Janette Mattala, a zoning inspector for the City, came to the scene and warned the protestors that they would have to remove the balloon or be subject to arrest. Police officers, who later arrived on the scene, also allegedly threatened the protestors with arrest. Consequently, the protesters deflated the balloon. The third demonstration occurred on July 31. During this protest, Tucker and his fellow Union members again displayed the rat balloon. At this demonstration, however, Tucker was given a citation for violating the city ordinance prohibiting structures in the public right-of-way. Notably, there is no evidence in the record indicating that the protests, including the use of the balloon, created any obstruction or safety hazard.

On August 27, 2003, Tucker and his Union filed a Complaint, Motion for a Temporary Restraining Order, and Motion for a Preliminary Injunction in the District Court for the Southern District of Ohio, claiming that the application of the City's ordinance to the use of the balloon violated the First Amendment. On August 29, the court issued a temporary restraining order, which expired on September 15. The court then held a hearing on the preliminary injunction on September 15, and, on October 27, granted Tucker's motion for a preliminary injunction, finding, among other things, that Tucker had demonstrated a likelihood of success on his claim that the City's efforts to prevent the Union from using the balloon during its demonstrations violated the First Amendment. The City timely appealed that decision to this Court on November 7, 2003.

II.

The only question presented in this case is whether the district court erred in granting a preliminary injunction prohibiting the City of Fairfield from restraining Tucker and his union from using the rat balloon during their labor protests on the public right-of-way in front of Fairfield Ford. This Court reviews a district court's grant of a preliminary injunction for an abuse of discretion. Keweenaw Bay Indian Cmty. v. Michigan, 11 F.3d 1341, 1348 (6th Cir. 1993). A district court abuses its discretion when it relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard. Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 400 (6th Cir. 2001).

When determining whether to grant a preliminary injunction, a district court must consider: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest." Id.

The district court considered these four factors and granted Tucker's motion for a preliminary injunction. The court found that Tucker had "a very high likelihood of success on the merits" of his claim based on "a First Amendment right to use portable, non-obstructive props to disseminate information in a public right-of-way on a temporary or limited basis." The court held that the ordinance, as applied to the use of the rat balloon, unconstitutionally infringed on this right. The court also found that the remaining factors weighed in

favor of granting the injunction. According to the court, the suppression of Tucker's protected speech constituted irreparable harm to the Union and the use of the balloon was not shown to harm others. Moreover, the court found that the public interest weighed in favor of protecting First Amendment rights. Consequently, the court, having found all factors in Tucker's favor, issued the preliminary injunction. For the following reasons, we hold that the district court did not abuse its discretion in granting the preliminary injunction.

A.

The First Amendment broadly provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In our view, there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to the Union's message. *See, e.g.*, Int'l Union of Operating Eng'rs, Local 150 v. Village of Orland Park, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001) ("We easily conclude that a large inflatable rat is protected, symbolic speech.").

The central claim asserted by the City on appeal is that there is no constitutional right to maintain a structure in a public right-of-way. As this Court has pointed out before, however, "whether there is such a right depends upon the property and the government's regulation of that property." Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 434 (6th Cir. 2004).

Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved. For instance, in Graff v. City of Chicago, 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc), the court considered whether a news vendor had a First Amendment right to maintain a newsstand on public property. The court rejected the claim, holding that "no person has a constitutional right to erect or maintain a structure on the public way." *Id.* As the *Graff* court pointed out, however, newsstands are "large, permanent-type structures" that "are not easily moved." Id. at 1315. In distinguishing newsstands from newsracks, which have received more favorable First Amendment protection, *see* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 772, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988) (holding unconstitutional an ordinance giving the mayor discretion to grant or deny applications for permits to place newsracks on public property), the court expressly noted that "newsstands compared to newsracks are much larger, more permanent structures that occupy a significant portion of limited sidewalk space." Graff, 9 F.3d at 1315.

A similar result was reached in Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341, 346-48 (7th Cir. 1990), where the court rejected a constitutional challenge to the City's refusal to allow a menorah to be erected in a public area of O'Hare Airport during Christmas time. The court noted the difficulty that would be involved in allowing all individuals to erect "free-standing" structures on public grounds, and expressly found no constitutional right to do so. Id. at 347.

Unlike the more permanent structures analyzed in Graff and Lubavitch, the balloon in the instant case is temporary and easily movable. The Union only uses the balloon during its protests, which last just one to two hours, and the balloon has not been shown to cause any danger that could justify a restriction of the balloon's use. As the district court pointed out, at least one federal court has adopted a similar approach in analyzing whether the use of "structures" on public property is constitutionally protected speech. *See* One World One Family Now, Inc. v. Nevada, 860 F. Supp. 1457, 1462-63 (D. Nev. 1994) (holding that group's portable tables were afforded First Amendment protection because of their limited use in facilitating the sale of expressive t-shirts, while chairs, umbrellas, and boxes were not protected because they were not sufficiently related to the expressive message and constituted "permanent-type" structures). Thus, given the existing case law on this subject, we hold that the district court did not abuse its discretion in finding that the use of the portable rat balloon on the public right-of-way is deserving of First Amendment protection.

Having held that the district court did not abuse its discretion in finding that the use of the balloon on the public right-of-way is constitutionally protected expression, the issue next becomes whether the City may nevertheless prohibit Tucker and his Union from using the balloon during its protests. "The Supreme Court has adopted a forum analysis 'as a means of determining when the government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.'" United Food & Commer. Workers Local 1099 v. City of Sidney, 364 F.3d 738, 746

(6th Cir. 2004) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)). Three types of fora are generally recognized: the traditional public forum, the designated public forum, and the nonpublic forum. *Id.* A traditional public forum is a place "which by long tradition or by government fiat has been devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). In our view, the district court did not abuse its discretion in finding that the forum in this case -- a public right-of-way -- is a traditional public forum, given the fact that both streets and sidewalks are generally considered traditional public fora. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 480, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) (noting its decisions holding that streets and sidewalks are traditional public fora); Rappa v. New Castle County, 18 F.3d 1043, 1070-71 (3d Cir. 1994) (holding that public rights-of-way are properly considered traditional public fora).

"In traditional public fora, 'the rights of the state to limit expressive activity are sharply circumscribed': the government may enforce . . . content-neutral time, place, and manner regulations only if they are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Kincaid v. Gibson, 236 F.3d 342, 348 (6th Cir. 2001) (quoting Perry, 460 U.S. at 45). The district court found that the ordinance here was not a content-based restriction on speech, and that finding apparently is not challenged before us. Thus, for the purposes of this appeal, we assume that this finding was correct. n2 Therefore, the ordinance is constitutional as applied if it is narrowly tailored to

serve a significant government interest, leaving open other alternative channels of communication.

In this context, "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," and does not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (quotation marks and citations omitted). Importantly, however, the regulation "need not be the least-restrictive or least-intrusive means" of serving the government's interests. *Id.* We agree with the district court's finding that the ordinance does not appear to be narrowly tailored as applied to the Union's use of the balloon. In our view, the asserted government interests of keeping the public right-of-way clear and preserving the aesthetics of the community, while generally considered substantial, are simply not achieved any less effectively absent the application of the ordinance in this case. There is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right-of-way has any adverse effects, such as obstruction of pedestrian or automobile traffic. By applying the ordinance to prohibit the temporary use of the balloon in this case, it therefore appears that the City has applied its ordinance in a manner that is "substantially broader than necessary" to achieve its interests. *See, e.g.*, Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388 (6th Cir. 1996) (holding unconstitutional ordinances regulating the placement of signs in residential neighborhoods because they burdened "substantially more speech than necessary,"

despite city's "significant government interest" in aesthetics). Thus, the district court did not abuse its discretion in finding that the Union has demonstrated a likelihood of success on the merits.

B.

The district court also found that the remaining factors weighed in favor of granting the injunction. The City does not appear to challenge these holdings on appeal. We note, however, that the district court's decision on each issue was proper. First, the application of the City's ordinance prohibiting the Union's use of the balloon, and the consequential adverse effect on Union organizational efforts, are sufficient to constitute irreparable harm. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Second, the use of the balloon in the right-of-way has not been shown to create any obstruction or other safety hazard, suggesting that granting the injunction will not cause substantial harm to others. Finally, the public interest factor in this case clearly weighs in favor of protecting the First Amendment rights of the Union's members. *See, e.g.*, Chabad, 363 F.3d at 436 (noting that "the public interest is served by preventing the violation of constitutional rights"). Accordingly, the district court did not abuse its discretion in holding that the relevant factors support the issuance of the preliminary injunction in this case.

III.

For the stated reasons, we hold that the district court

did not abuse its discretion in granting Tucker's motion for a preliminary injunction, and we therefore AFFIRM the decision of the district court.

Footnotes

n1 The Fairfield City Council's express intent to cover "objects such as the inflatable rat involved in the *Tucker* litigation" is illustrated by the amendment's preamble, which clearly states that the Council's purpose in enacting the amendment was "to amend its codified ordinances to further clarify that objects such as the inflatable rat are prohibited from the public right-of-way whether placed there on a temporary or permanent basis."

n2 We note that it appears that the amended ordinance, with its express purpose of prohibiting the use of the rat balloon, may not be content-neutral. We reserve judgment on this question, however, until the district court fully considers the issue on the merits.

DISSENT BY: KENNEDY

DISSENT: Circuit Judge, dissenting. Unlike the majority, I would find that the Union is unlikely to succeed on the merits. Therefore, I believe that the district court abused its discretion when it improperly applied the law. Deja Vu of Nashville, Inc., V. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 400 (6th Cir. 2001). Additionally, I do not believe that the other factors (irreparable harm, harm to others, and the public's interest), many, if not all, of which rest on the perceived violation of the Union's First Amendment rights, weigh so heavily in favor of the

plaintiffs that those factors support the grant of a preliminary injunction. Therefore, I respectfully dissent.

A. Likelihood of success on the merits

1. The rat is a structure.

As a preliminary matter, there are several points on which the district court, the majority, and I agree. First, we agree that the rat constitutes speech. Furthermore, we agree that the rat constitutes speech that deserves First Amendment protection. Implicitly at least, we all agree that the City's ordinance applies to the rat (making the rat a structure under either the first or the revised definition). The district court attempts to avoid this conclusion by holding that "It is not appropriate to simply label the rat a structure and then ban it from the right-of-way without examining the nature of the alleged structure." Apx. 46. The majority opinion does not explicitly address whether the rat is a structure, but, by applying a time, place, and manner analysis, it too implicitly agrees that the inflatable rat is a structure under either version of the ordinance's definition.

Although I may seem to be quibbling over details, I am not. Courts must avoid raising constitutional issues where alternative and narrower grounds exist. Bejjani, v. I.N.S., 271 F.3d 670, 687 (6th Cir. 2001). If the rat is not a structure as the ordinance defines it (or defined it), then the district court erred in ruling on a First Amendment basis where none was present. Instead, it should have held that the rat was not a structure and ordered the City to cease attempting to apply the

ordinance to the rat. Because the district court rules on First Amendment grounds and because the majority reviews that analysis, the majority seems to agree (at least implicitly) that the inflatable rat falls under the ordinances' definitions of structure.

In my view, the rat is a structure under either version of the ordinance. Even under the earlier ordinance, the City defined a structure, in part, as: ". . . anything constructed which is not enclosed within another structure and is placed in a stationary location." Although the first part of the definition includes a requirement that the structure be permanent, this second part does not. Dictionary.com defines constructed as: "To form by assembling or combining parts; build." (*available at* http://dictionary.reference.com/search?q=constructed). The Random House College Dictionary Revised Edition defines construct as "to form by putting together parts; build; devise." 1980.

By using a generator to inflate the rat on a tarp, the rat is assembled or formed by putting together parts. By tethering it to the ground, the rat is further formed by combining parts. Given these definitions, the inflatable rat meets the ordinance's requirement that it be constructed. In addition, the rat satisfies the "placed in a stationary location" requirement given that the rat and its generator are placed in a stationary location when they are staked down, albeit, for one to two hours, or for however long the Union decides to leave them there. Therefore, the rat meets all of the requirements under this portion of the first ordinance's definition of structure. n1 No one disputes that the rat meets the City's revised definition of structure.

Because the rat is a structure, and because both versions of the ordinance ban all structures in right-of-ways, we must address the constitutional question of whether the City can use its ordinance to ban the rat despite the fact that the rat is speech.

2. The ordinance is a permissible time, place, and manner restriction.

We also agree on most points of the First Amendment analysis. I agree with the district court and the majority that the right-of-way is a traditional public forum; that the area where the rat was erected was akin to a sidewalk; and that time, place, and, manner analysis is the appropriate framework for reviewing the ordinance as applied.

When performing a time, place, and manner analysis, courts must evaluate the ordinance against several standards. First, courts must determine whether the ordinance is content neutral. No one disputes that the City's ordinance is content neutral. It is important to keep in mind that the ordinance applies city-wide to all rights-of-way whether there are sidewalks and a tree lawn, or just a grassy area as we have here.

Next under time, place, and manner analysis, we evaluate whether the City has a significant interest as well as whether the ordinance is narrowly tailored to meet that interest. All agree that the City has a significant interest. The majority identifies the City's significant interests as keeping the right-of-way clear (presumably to further public safety and permit pedestrian passage) and preserving the aesthetics of the community. I agree that those interests are

significant. *See* Ward, et al., v. Rock against Racism, 491 U.S. 781, 796, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (noting that protecting citizens from excessive noise is a significant government interest); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 781-82, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988) (identifying public safety as a significant interest); Clark v. Community for Creative Non-Violence, et al., 468 U.S. 288, 296, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984) (identifying keeping our nation's parks in an attractive condition as a significant interest); Heffron, et al., v. International Society for Krishna Consciousness, 452 U.S. 640, 650, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981) (upholding the state's interest of maintaining the orderly movement of crowds at a fair).

The majority and I part company, however, in our view of whether the ordinance is narrowly tailored to serve the identified significant government interests. The majority believes that the ordinance is not narrowly tailored. In so holding the majority reasons:

[The interests] are simply not achieved any less effectively absent the application of the ordinance in this case. There is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right-of-way has any adverse effects, such as obstruction of pedestrian or automobile traffic. By applying the ordinance to prohibit the temporary use of the balloon in this case, it therefore appears that the City has applied its ordinance in a manner that is "substantially broader than necessary" to achieve its interests. Thus, the district court did not abuse its discretion in finding that the Union has demonstrated a likelihood of success on the merits.

Maj. Op. (internal citation omitted). I believe that the majority departs from Supreme Court precedent, which admonishes lower courts that a regulation is narrowly tailored so long as it " . . . promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985). In Frisby v. Schultz, 487 U.S. 474, 485, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) the Court indicated that a complete ban "can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." In *Ward*, the Court clarified its earlier jurisprudence by confirming that: "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward, 491 U.S. at 800. Thus, the Court has indicated that, in this context, the narrowly tailored test is a far more lenient test than a least restrictive means test. *Id.* Indeed, some amount of over inclusiveness is permissible provided that the evil targeted by the statute is permissible. *See id.* (The Court indicates that "the . . . regulation may [not] burden substantially more speech than is necessary" indicating that some overinclusiveness may be permissible).

In finding that the ordinance is not narrowly tailored, the district court held that it was important to investigate the nature of the structure. Apx. 46. The majority seems to agree with that analysis. I believe that investigating the nature of the structure, beyond what little investigation is required to determine

whether an object is a structure, is an incorrect mode of analysis that has the effect of saddling the City with an impossible legislative task, or requiring courts to reach necessarily arbitrary results. Why does a structure whose nature only requires it to be present for a limited time not undermine the City's objective of keeping the right-of-way clear when a more permanent structure does so? The district court indicates that if the Union wished to leave the inflatable rat in the right-of-way constantly, it would reach a different result. Apx. 46. What exactly constitutes "an extended period of time" that would require resolving this dispute in the City's favor? *Id.* Four hours? Ten? Twenty-four? Alternatively, what public employee is to be given the discretion to determine that amount of time, and how is that discretion to be limited so that time, place, and manner neutrality is maintained?

While I do not want to belabor the line-drawing problems, I raise them simply because I do not believe that the district court's position is a tenable way to evaluate the level of protection the structure deserves. Instead, I believe that we must look to the significant interest and then determine whether the ordinance narrowly targets the identified evil. Ward, 491 U.S. at 799-800.

In evaluating whether the ordinance is narrowly tailored to serve the significant interest, it is, in my view, also important to evaluate whether the ordinance serves a significant interest, and whether it is narrowly tailored, independently of the value courts accord the speech. The majority believes that: "By applying the ordinance to prohibit the temporary use of the balloon *in this case*, it therefore appears that the City has

applied its ordinance in a manner that is 'substantially broader than necessary' to achieve its interests." Maj. Op. (emphasis mine). Although this is an as-applied analysis, the majority's rule on narrow tailoring quickly becomes an easy way for courts to second guess legislatures. Courts would be able to carve out exceptions to the enforcement of ordinances if the court deems the speech at issue vital enough simply by balancing the identified interest against the value of the speech. In essence, judges would be able to substitute their own judgments as to the value of different kinds of speech in an as-applied challenge and balance that speech with their view of the value of the government interest at stake. My guess is that, subjected to such a balance, few ordinances would survive unscathed. Nor can the City leave to the discretion of some city employee that decision without running afoul of the Court's decision in Plain Dealer, 486 U.S. at 763-4 ("We have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.").

While protecting speech is undoubtedly among the most important things the judiciary does, the Supreme Court's jurisprudence on time, place, and manner restrictions does not subject those restrictions to such rigorous or arbitrary scrutiny. So long as, in general, the City has a significant government interest, and so long as the ordinance is narrowly tailored to serve that interest, as is the case here, it should not matter what type of speech is affected by the ordinance for the

purpose of this portion of time, place, and manner analysis. Thus, we should evaluate an ordinance's narrow tailoring only in relation to the identified significant government interest and not in relation to the speech it affects.

Given that the interest here is keeping the right-of-way clear, an outright ban of structures is a reasonably narrow means of serving that interest. The right-of-way is blocked by a structure regardless of whether that structure is present for one hour or one year. Part of the public safety rationale that forms the basis for keeping the right-of-way clear likely involves allowing emergency vehicles free access to it in the event of a problem. If a structure is present in the right-of-way for any period of time, that significant interest is diminished. While it is true that a structure present for two hours diminishes the interest less than would a structure present for a much longer time, all that the City needs to show in order to prove narrow tailoring is that the evil targeted is remedied by the ordinance in a manner that is not unnecessarily overinclusive. I believe that the ordinance in this case meets that standard and is, therefore, narrowly tailored to serve the significant interest. n2

Because I believe that the ordinance is narrowly tailored to serve a significant interest, I must also address the final portion of time, place, and manner analysis, which requires that the ordinance in question "leave open ample alternative channels of communication . . . ". Ward, 491 U.S. at 802. Ample alternative channels of communication are readily available here.

The City's complaint, at least the one identified in the briefs and at oral argument, is not that the rat is present at all in the right-of-way, instead, the City objects to it being staked down and kept in place. The Union indicates that the rat could be moved around instead of staking it down. Apx. 159-61. In addition, presumably, so long as the rat was placed on a cart or a wagon and provided that the cart or the wagon was moved about during the demonstration, the City would not object to its presence as the ordinance would not apply. Even if I am incorrect and the inflatable rat itself could not be used, the Union could still make signs with pictures of rats on them, pass out smaller rat balloons to passers-by, or use many other methods to communicate its message. Ample alternative channels of communication are available here. Therefore, because I believe that the ordinance as-applied to the rat passes the time, place, and manner tests, I believe that the Union is unlikely to succeed on the merits of its case.

B. Other factors

Given that I do not believe that the Union is likely to succeed on the merits, I do not believe that it would suffer irreparable harm if the injunction is not granted. Furthermore, given that the Union has ample alternative channels of communication available to it, I believe that any harm it would suffer would be minimal. Therefore, this factor, at best, does not weigh in favor of either party, and it may weigh in favor of not granting the injunction. Finally, although the majority believes that "the public interest factor in this case *clearly* weighs in favor of protecting the First Amendment rights of the Union's members[.]" (citation

omitted) (emphasis mine), I believe that this interest must be balanced with the public interest in local governments being able to legislate and enforce laws that those governments deem necessary. Therefore, I do not believe that this factor is clearly in favor of either party even if the constitutional issues do tilt the balance one way. Finally, while granting the injunction will likely not harm others, that factor alone cannot save the district court's grant of a preliminary injunction, even on abuse of discretion review.

C. Conclusion

Because I believe that the City's ordinance is a permissible time, place, and manner restriction, that that fact means that the Union is unlikely to succeed on the merits of its case, and because I do not believe that the other factors point clearly in one direction, I believe that it was an abuse of discretion for the district court to grant the preliminary injunction. I would reverse the district court's grant of a preliminary injunction and remand for further proceedings.

Footnotes

n1 The revised ordinance defines structure as ". . . any object, whether permanent or temporary, including, but not limited to, non-public signs, that is constructed, erected or placed in a stationary location on the ground or is attached to or placed upon an object constructed, erected or placed in a stationary location on the ground." By including "any object, whether permanent or temporary," the ordinance alleviates the district court's concern that the earlier ordinance might have only applied to permanent structures. As I discuss

later, I do not believe that one can look to the nature of a structure in determining whether the city can constitutionally ban it through a time, place, and manner restriction.

n2 The above analysis also applies to the aesthetic significant interest of the city. The city's aesthetic goals are diminished the moment a structure is constructed in the right-of-way.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LYNN D. TUCKER, JR., et al.,
Plaintiffs,

v.

CITY OF FAIRFIELD, OHIO, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 27, 2003, Plaintiffs filed this lawsuit pursuant to 42 U.S.C. § 1983 to, inter alia, enjoin the City of Fairfield from enforcing City Ordinance 905.03 against them. As applied to Plaintiffs by the City of Fairfield, § 905.03(c) precludes Plaintiffs from using a large, inflatable rat balloon in the public right-of-way as they picket Fairfield Ford for unfair labor practices. Section 905.03 forbids the placement of structures in the right-of-way and, as interpreted by the City, Plaintiffs' rat balloon is a structure within the meaning of the ordinance. Contemporaneously, Plaintiffs filed motions for a temporary restraining order (Doc. No. 2) and a preliminary injunction (Doc. No. 3).

On August 29, 2003, after notice to Defendants and a hearing, the Court granted Plaintiffs' motion for a temporary restraining order and established September 15, 2003 as the date for a hearing on a preliminary and permanent injunction. See Doc. No. 7. In the interim between the entry of the temporary

restraining order and the date of the hearing, the City amended 905.03 to make it explicit that the rat balloon fell within the meaning of the term "structure." Therefore, the parties agreed that the hearing should proceed only on the issue of whether a preliminary injunction should be entered. See Hearing Transcript (Doc. No. 13), at 2-3, 5, 10.

The Court, having considered the pleadings filed by the parties, the evidence presented at the hearing, and the preand post-hearing briefs of counsel,[1] hereby enters the following Findings of Fact, Conclusions of Law, and Order. To the extent that the foregoing findings of fact should more properly be considered conclusions of law, and vice versa, they are hereby adopted as such.

I. Findings of Fact

1. The Plaintiffs in this case are Lynn D. Tucker, Jr. and the International Association of Machinists and Aerospace Workers, District Lodge 34 ("the Union"). Complaint Secs. 5, 6.

Tucker is the General Vice President of the Union's Eastern Regional Office. Id. Par. 5. The Union is a labor organization as defined by § 2(5) of the National Labor Relations Act. Id. 91 6. One of Tucker's job responsibilities is to organize non-union shops. Tr. at 15.

2. The Defendants in this case are the City of Fairfield, a municipal corporation organized under the laws of the state of Ohio, Lt. Kevin Haddix of the Fairfield Police Department, and Janette Mattala, the zoning inspector for the City of Fairfield. Complaint Pars. 7-9. Plaintiffs sue Haddix and Mattala in their individual capacities.

3. In April 2003, the Union was certified as the collective bargaining representative for the automotive technicians who work at Fairfield Ford. Complaint 9I 11; Tr. at 16-18. Fairfield Ford is located on State Route 4, also known as Dixie Highway, in the city of Fairfield. Id. at 18. Fairfield Ford, however, has refused to negotiate with the Union and, in fact, has been found by the National Labor Relations Board to have committed an unfair labor practice by refusing to negotiate. Id. at 16; Plaint. Hearing Ex. 2.

4. In order to protest and draw attention to Fairfield Ford's unfair labor practices, local union members and Plaintiff Tucker picketed Fairfield Ford on February 26, 2003, July 1, 2003, and July 31, 2003 . Tr. at 17, 26, 34. There were anywhere from twenty-five to forty protestors at each demonstration. Id. at 18, 26, 36. The protests all took place in the public right-of-way between Dixie Highway and Fairfield Ford. Id, at 18. The demonstrations typically lasted only one hour with two hours being the maximum duration of any one demonstration. Id. at 21, 41. The demonstrations have always been conducted in a peaceful and, except for the alleged violation of the city ordinance, lawful manner. Id. at 37

5. In addition to using picket signs, the protestors also employed a large inflatable rat at these demonstrations. Tr. at 25. The rat has long been used in the labor movement as a symbol of protest against unfair labor practices. Complaint 14; Id. at 19, 85. In this case, the rat in question is approximately twelve feet high when inflated and approximately eight feet square at its base. Tr. at 19. It is inflated by means of a portable

generator. Id. at 21. It takes only about five minutes to inflate the rat and approximately the same amount of time to deflate it. Id. at 20-21. The rat is easily picked up and moved around. Id. at 21. The rat, however, usually remains stationary and the demonstrators usually secure the rat with tethers and stakes so that it does not tip over. Tr. at 2122. The demonstrators always pack up the rat and take it with them when they leave. I., at 21, 54.

6. The City of Fairfield has enacted Ordinance 905.03, which governs the use of public streets, alleys, and grounds. Subsection (c) of § 905.03, as originally enacted, provides:

No person, firm, or corporation shall construct or place or cause the construction or placement of any shrubbery, trees, parking facilities or any other structure or improvement, other than approved street trees and mailboxes, on any street, alley, public right or [sic] way, easement or public grounds without the written permission of the Public Works Director.

As originally enacted, the ordinance defined "structure" as:

anything constructed, the use of which requires permanent location on the ground or attachment to something having permanent location on the ground, and also includes anything constructed which is not enclosed within another structure and is placed in a stationary location.

The amended ordinance, which was enacted with Plaintiffs' rat balloon in mind, defines "structure" as:

any object, whether permanent or temporary, including, but not limited to, non-public signs, that is constructed, erected or placed in a stationary location on the ground or is attached or placed upon an object constructed, erected, or placed in a stationary location on the ground. This definition does not include motor vehicles. However, non-motor vehicle objects attached to or placed upon motor vehicles which motor vehicles are themselves placed in a stationary location are included.

Def. Hearing Ex. A.

7. The Union generally notifies the police department when they are about to conduct a demonstration and specifically notifies the police that they will be using the rat. Tr. at 60. The Union notified the Fairfield Police Department about its February 26, 2003 demonstration, including that they intended to use the rat. Although Fairfield Ford subsequently called the police to complaint about the demonstration, and the police in fact arrived at the demonstration, no arrests were made or citations issued over the use of the rat. Id. at 60-61. Public response to this demonstration was generally favorable. Id. at 61.

8. The Union planned a second demonstration in front of Fairfield Ford on July 1, 2003. The Union again notified the police about their plans to picket Fairfield Ford. Tr. at 26. Although they were not initially notified by the police department that use of the rat in the right-of-way was a violation of the City ordinance, Defendant Mattala arrived at the demonstration and informed the protestors that they would have to

remove the rat or else be arrested. Id. at 27-28. Subsequently, approximately four or five police cruisers arrived on the scene. Id. at 29. Police officers at the scene repeatedly warned the demonstrators that they would be arrested if they did not take down the rat. Id. at 30. Plaintiffs deflated the rat as a result of the threats of arrest. Id.

9. Essentially the same sequence of events occurred at the July 31, 2003 demonstration except that Plaintiff Tucker actually received a citation for violation of the ordinance. See Tr. at 34-36, 39.

10. The demonstrations, including the times when the rat was in use, never blocked or obstructed traffic along Dixie Highway or the entrance into Fairfield Ford, nor were the demonstrators themselves ever disorderly or unruly. Tr. at 23, 28-29, 37, 38, 40-41, 43, 44, 158, 180, 181-82, 184.

11. The actions of the City of Fairfield in threatening the demonstrators with arrest and issuing a citation to Plaintiff Tucker have adversely affected the Union's efforts to organize other shops. Tr. at 46-48, 72-74.

II. Conclusions of Law

A. Preliminary Injunction Standard of Review

In determining whether to grant injunctive relief, the trial court must balance and weigh the following factors: the plaintiff's likelihood of success on the merits, the existence of irreparable harm to the plaintiff in the absence of an injunction, whether others will be harmed if an injunction is issued, and the public's

interest in issuing an injunction. McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 459 (6th Cir. 1997). These factors are not prerequisites to issuing an injunction but factors to be balanced. See Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean, 755 F.2d 1223, 1229 (6th Cir. 1985). The court, however, should not issue a preliminary injunction where there is no likelihood of success on the merits. Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1249 (6th Cir. 1997).

B. Analysis

1. Likelihood of Success on the Merits

Although the Court has set forth relatively detailed findings of fact, the facts of this case are basically undisputed. The main issue presented in this case is really one of law and that question is whether the City of Fairfield may prevent the Union from using the inflatable rat during its demonstrations on the public right-of-way without violating Plaintiffs' First Amendment rights. As a preliminary matter, the Court notes again that the use of the rat itself is speech protected by both the First Amendment and federal labor law. International Union of Op. Eng. Local 150 v. Village of Orland Park, 139 F. Supp.2d 950, 958 (N.D.Ill. 2001); see also National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283 (1974). Second, although the City clearly amended the ordinance to bring the inflatable rat within the scope of its coverage, the Court still views the ordinance as a content-neutral time, place, and manner restriction. It seems pretty clear to the Court that the City is not trying to suppress the message, but only regulate the manner in which the

message is conveyed. Therefore, the Court does not find that the ordinance is a content-based restriction on speech. A content-neutral restriction will be upheld if it is narrowly tailored to meet an important governmental interest and leaves open ample other means of communication. Spignola v. Village of Granville, 34 Fed. Appx. 978, 983-84 (6th Cir. 2002).

The City's argument, and indeed its mantra, in favor of upholding the constitutionality of the ordinance as applied to Plaintiffs is that "Plaintiffs have no First Amendment right to erect structures in the right-of-way." If Plaintiffs simply wanted to blow up the rat and leave it in front of Fairfield Ford for an extended period of time, the Court would agree with the City and this case would be resolved easily in its favor. Plaintiffs, however, have used the rat in a very narrow and limited way. Their demonstrations have been of very limited duration, two hours at the most, and they have always packed up the rat and taken it with them at the conclusion of each demonstration. Nor are Plaintiffs claiming at this time that they should be able to leave the rat up for as long as they wish. In fact, Plaintiffs do not evidence any present desire to use the rat for extended time periods. See Tr. at 233. Therefore, the cases cited by the City in support of its argument in favor of constitutionality are distinguishable on their facts from the instant case. Furthermore, because the cases are distinguishable, it is immaterial whether the inflatable rat is a "structure" within the meaning of the ordinance under either the original or amended ordinance. Assuming that the rat is a "structure" within the meaning of the ordinance does not change the Court's analysis. It is not appropriate to simply label the rat a structure and then ban it from the right-of-

way without examining the nature of the alleged structure.

Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993), indeed involved the erection of a structure on a public right-ofway and the Court did state that the plaintiff had no right to erect a structure on public property. See id. In Graff, however, the structure in question was a newsstand which had been located on city property for seventy years. See id. at 1311. The newsstand itself was constructed of wood and there is a suggestion in the opinion that a bulldozer would be required to demolish it. See id. at 1313. The Court further commented that "Newsstands are large, permanent-type structures. They are constructed, and once in place they are not easily moved." Id. at 1315. Furthermore, in distinguishing its case from other cases which permitted newsracks to be located on public sidewalks, the Court noted that newsstands occupy significant more sidewalk space than newsracks. Id. The Court further commented that "Size matters, and a newsstand is more closely related to a building than it is to a newsrack." Id. at 1315 n.4.

In contrast to the seventy-year period in which the newsstand in Graff stood on public property, Plaintiffs in this case only want to use the rat for at most a couple of hours. Moreover, when their two-hour demonstration is over, they take the rat with them. And, although the rat is of fairly sizeable dimensions, unlike the newsstand in Graff, it is easily portable by only a few people and can quicky be moved out of the way if need be.

In addition, the rat itself appears to take up no more

space and causes no more obstruction than the demonstrators themselves, whom the City concedes have a First Amendment right to protest in the right-of-way. See Plaint. Ex. 8.

Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341 (7th Cir. 1990), is distinguishable from this case for many of the same reasons. In Lubavitch, the plaintiff wanted to erect a free-standing menorah in a public area of O'Hare Airport during the Christmas season. The Court upheld the city's refusal to allow the menorah to be erected, stating that the plaintiff did not have "any private constitutional right to erect a structure on public property." Id. at 347. Although the Court in Lubavitch did not describe the menorah in question in any detail, given that it was "free-standing" and that plaintiff wanted to put it up during the Christmas season, it seems reasonable to infer that the plaintiff intended to leave the menorah in place, unattended, twenty-four hours a day throughout the holiday season. In contrast, as noted earlier, in this case, Plaintiffs have used and intend to the use the rat for only a few hours at a time, and then take it with them at the end of the demonstration. Therefore, the Court finds that Lubavitch is not applicable here either.

The next case relied on by the City is City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). Taxpayers for Vincent involved a restriction on the posting of handbills in public places and on public objects, such as utility poles. In upholding the ban on the posting of handbills, the Court noted that cities "have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." Id. at 806. Furthermore, the handbills

were a "visual assault on the citizens of Los Angeles" because of "accumulation of signs on public property." Id. at 807. In distinguishing its case from Schneider v. State, 308 U.S. 147 (1939), which involved distribution of leaflets to passers by, the Court noted that in Schneider "the conduct continued only while the speakers or distributors remained on the scene." Id. at 808. In its case, the Court noted, "appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed." Id. Thus, our case is like Schneider and is distinguishable from Taxpayers for Vincent because Plaintiffs' use of the rat continues only while they are on the scene and they because do not leave the rat in place unattended for any extended period of time.

On the other hand, at least one other district court case is similar to the case at hand. In One World One Family Now, Inc. v. State of Nevada, 860 F. Supp. 1457 (D.Nev. 1994), Nevada's Department of Transportation enacted a regulation which forbid the placement of "encroachments" on public highways. Plaintiffs wished to set up tables, chairs, umbrellas, boxes and signs on a public sidewalk in Las Vegas in order to distribute religious and political messages. The Department of Transportation took the view that setting up the tables and other paraphernalia on a public sidewalk was an encroachment on a public highway. See id. at 1460-61. The Court found that banning the tables from the sidewalk violated plaintiffs' First Amendment rights because the tables facilitated the dissemination of plaintiffs' message and were relatively small and portable rather than permanent. Id. In contrast, the Court upheld the restriction on setting up chairs and umbrellas because those items only facilitated the

comfort of the plaintiffs. In addition, the Court noted that use of chairs and umbrellas came close to establishing a permanent-type structure, similar to the newsstand in Graff. Id. at 1463.

What all of these cases tend to show, particularly in the way that the Taxpayers for Vincent Court distinguished Schneider, is that there is a First Amendment right to use portable, non-obstructive props to disseminate information in a public right-of-way on a temporary or limited basis. In other words, as long as the prop in question does not obstruct the right of way (or can be easily removed from the right-of-way) and causes no lingering adverse effects at the conclusion of the demonstration, the prop cannot be banned from the right-of-way. In this case, the inflatable rat meets all of these criteria because it is not obstructive, can be moved easily, and is deflated and removed from the scene at the conclusion of each demonstration. Therefore, the City's ordinance, as applied to Plaintiffs' use of the inflatable rat, is unconstitutional.

Moreover, the ordinance, as applied to Plaintiff's use of the rat, is not narrowly tailored because the ban furthers no governmental interest. Ward v. Rock Against Racism, 491 U.S. 781, 782-83 (1989) ("The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest."). The City's fatal admission where the narrow tailoring requirement is concerned is that Plaintiffs may lift and carry the rat around in the right-of-way,

but that they violate the ordinance as soon as they set it down in the right-of-way. That being the case, no governmental interest is furthered by application of the ordinance to Plaintiffs. The rat sitting on the ground causes no more obstruction, and is probably less obstructive, than it would when held up in the air. Furthermore, because the rat is easily moved, setting it on the ground is not likely to cause any obstruction to foot traffic. Placing the rat on the ground is no more an esthetic nuisance than picking it up and carrying it around in the right-of-way. Indeed, because Plaintiffs use the rat for only a few hours at a time and take it with them when they are done for the day, the chances of the rat creating any lingering adverse consequences to esthetics or property values are almost nil. In fact, as applied to Plaintiffs, the City's distinguishing between placing the rat on the ground and carrying it around is plainly arbitrary.

Accordingly, for the reasons stated, Plaintiffs have a very high likelihood of success on the merits.

2. Irreparable Harm

The irreparable harm factor again favors Plaintiffs heavily. Suppression of protected speech, even for minimal periods of time, constitutes irreparable harm. Connection Dist. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998). Furthermore, Plaintiffs have demonstrated that the City's enforcement of the ordinance against them has adversely affected their efforts to organize other car dealerships.

3. Harm to Others

Use of the rat in the right-of-way has not been shown to create an obstruction or other safety hazard. Therefore, this factor falls on Plaintiffs' side of the ledger.

4. The Public's Interest

As noted before, the public interest is in favor of protecting First Amendment rights. United Food & Comm. Workers Union, Local 1099 v. Southwest Ohio Reg. Trans. Auth., 163 F.3d 341, 363 (6th Cir. 1998). Thus, this factor weighs in Plaintiffs' favor as well.

Conclusion

In conclusion, the factors for determining whether to grant injunctive relief are all in Plaintiffs' favor. They have established a high likelihood of success on the merits and they have established the existence of irreparable harm in the absence of injunctive relief. Harm to others is unlikely to result and the public interest is in favor of granting injunctive relief.

Accordingly, Plaintiffs' motion for a preliminary injunction is well-taken and is GRANTED. The same terms and conditions impose(by the Court in granting Plaintiff's motion for a temporary restraining order remain in full force and effect.

IT IS SO ORDERED

Date October 27, 2003

Sandra S. Beckwith United States District Judge

Footnote

1The parties' post-hearing briefs also address claims for denial of equal protection and selective enforcement raised in Plaintiffs' amended complaint, which was filed after the hearing. Because the purpose of hearing was to determine whether to grant injunctive relief on use of the rat in the right-of-way, the Court declines to address those claims at this time. Instead, the Court will reserve the equal protection and selective enforcement issues for disposition at the permanent injunction stage.

No. 03-4508

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LYNN D. TUCKER, JR., et al.,
Plaintiffs-Appellees,

v.

CITY OF FAIRFIELD, OHIO, et al.,
Defendants-Appellants.

April 28, 2005, Filed

Order

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Kennedy would grant rehearing for the reasons stated in her dissent.

ORDINANCE NO. 155-03

ORDEINANCE TO AMEND SECTION 905.03 OF CHAPTER 905, STREETS, UTILITIES AND PUBLIC SERVICES CODE, OF ORDINANCE NO. 166-84, THE CODIFIED ORDINANCE OF FAIRFIELD, OHIIO, RELATIVE TO PLACEMENT OF STRUCTURES IN THE PUBLIC RIGHT-OF-WAY AND DECLARING AN EMERGENCY.

WHEREAS, the City of Fairfield, Ohio has recently been named in litigation styled as Lynn D. Tucker, Jr., et al., Plaintiffs v. City of Fairfield, Ohio et al. Defendants, Civil Action No. C-1-03-607 of the united States District Court, Southern District of Ohio, Western Division, in which the Court has issued a Temporary Restraining order against the City, and

WHEREAS, the Court in this Temporary Restraining Order Determined that the definition of "structure" in Fairfield Codified Ordinances did not include objects such as the inflatable rat involved in the Tucker litigation, and

WHEREAS, this Council believes that objects such as the inflatable rat involved in the Tucker litigation are and should be included in the definition of "structure" so as to be prohibited from placement in the public right-of-way for the protection of substantial governmental interests hereinafter discussed, and

WHEREAS, this Council wishes to amend its codified ordinances to further clarify that objects such as the inflatable rat are prohibited from the public right-of-way whether placed there on a temporary or

permanent basis, and

WHEREAS, the City of Fairfield, Ohio has a substantial governmental interest in promoting public safety in the use of public rights-of-way by ensuring the smooth and safe flow of pedestrian and street traffic, and

WHEREAS, the City of Fairfield, Ohio also has a substantial governmental interest in promoting the aesthetic appeal of and preventing visual blight in its public rights-of-way, and

WEHREAS, neither the First Amendment nor any other constitutional provision create a right of private individuals to erect structures, including freestanding structures, in the public rights-of-way, and

WHEREAS, it has been determined that the City of Fairfield, Ohio may legally and constitutionally restrict the placement of objects ,including, but not limited to , non-public signs, in the public rights-of-way under the holding of the United States Supreme Court in the case of Members of the City Council of the City of Los Angeles, et al. v. Taxpayers for Vincent et al. , 466 U.S. 789 (1984), and as stated In the case of Lubavitch Chabad House, Inc. v. City of Chicago, 917 F. 2nd 341 (7th Cir. 1990), and

WHEREAS, this Council believes that without regulation of the erection or placement of private structures in the public rights-of-way, such structures will be erected or placed at the will of private individuals and that the substantial governmental interests identified above will be impaired to the

detriment of the City of Fairfield, its inhabitants and the motoring public in general, and

WHEREAS, for the purpose of promoting the substantial governmental interests identified above, there is no significant difference between a structure or object which is attached to the ground or which is simply placed in a stationary location in the public right-of-way and the City of Fairfield may legally and constitutionally regulate the use of its public rights-of-way in either instance,

NO, THEREFORE, BE IT ORDAINED by the Council of the City of Fairfield, Ohio, that:

Section 1. Section 905.03 of Chapter 905 of Ordinance No. 166-84, The Codified Ordinances of Fairfield, Ohio is hereby amended to read as follows:

905.03 STREETS, ALLEYS AND PUBLIC GROUNDS.

(a) Obstructing Vision. No person, firm or corporation shall place or cause to be placed any snow, earth, debris, or any other materials in such a manner or in such proximity to a street, alley or public grounds so as to obstruct the vision of persons entering, exiting or traveling over such streets, alleys or public grounds. This section shall not apply to employees or agents of the City or any other public agency who are plowing or removing snow, earth, debris or any other materials within the public streets, alleys or grounds.

(1) No person, firm or corporation shall place or cause to be placed any earth, mud, snow, debris or any other material or object upon any street, alley or

public grounds. Any person, firm or corporation who causes or permits the littering of any street, alley or public grounds with earth, mud, snow, debris or any other material or object shall immediately clean and/or remove the same. If the person, firm or corporation fails or is unable to remove the earth, mud, snow, debris or other material or object immediately after being notified to do so, then the cleaning service shall be rendered by the street division at the current hourly rates of its equipment and personnel.

(2) The street division shall render the bill for the services to the person, firm or corporation in violation of subsection (b)(1) hereof and shall also send a duplicate bill to the Finance Director.

(c) Structures on Streets, Alleys, Public Rights-of-Way, Easements and Public Grounds. No person, firm or corporation shall construct or place or cause the construction or placement of any structure on any street, alley, public right-of-way, easement or public grounds except the following:

(1) Driveway aprons connected to public streets approved by the Director of Public Works or designee in accordance with applicable ordinance requirements as to size, location and construction.

(2) Approved street trees and plantings in accordance with applicable ordinances.

(3) Mailboxes approved by the Director of Public Works or designee as to size, location and construction.

(4) Public and quasi-public utility facilities and other public and quasi-public uses approved by the Public Works Director or designee as to size, location and construction.

(5) Public signs, streets, roads, bridges, traffic control and drainage facilities and related

appurtenances approved by the Public Works Director or designee as to size, location and construction.

Newsracks, if, and only to the extent required, under the constitutions of the United States or State of Ohio, provided that such newsracks are maintained in good order and repair, are not located in the paved street or roadway, curb or shoulder of the street or road, do not obstruct the safe passage or sight distance of motorists or pedestrians in the public right-of-way, do not block sidewalks or other pedestrian ways such that a pedestrian cannot traverse along the sidewalk or way without leaving the paved surface and do not interfere with public and quasi-public utility facilities.

(d) Permit for Material on Street. No person, firm or corporation shall place or cause to be placed upon any street, alley, sidewalk or public grounds in the City any rubbish, stone, brick, lumber or other material. However, persons, firms or corporations engaged in the repair or construction of any building in the City may temporarily occupy certain portions of a street or sidewalk upon first obtaining written permission for that purpose from the Public Works Director. The Public Works Director is authorized and empowered to limit in the permit the amount of space in any street or sidewalk that may be used for such purpose, and any person, firm or corporation violating the terms of the permit shall by subject to the penalty provided in this chapter. The person, firm or corporation obtaining written permission for the temporary occupation of a street or sidewalk shall leave the street and/or sidewalk cleaned and in the same or better state of repair as existed prior to the temporary occupation. Failure to leave the street and/or sidewalk cleaned shall constitute a violation of subsection (b) hereof.

(e) As used in this section, the term "structure" means any object, whether permanent or temporary, including, but not limited to, non-public signs, that is constructed, erected or placed in a stationary location on the ground or is attached to or placed upon an object constructed, erected or placed in a stationary location on the ground. This definition does not include motor vehicles. However, non-motor vehicle objects attached to or placed upon motor vehicles which motor vehicles are themselves placed in a stationary location are included.
(Ord. 155-03. Passed 9-13-03.)

Section 2. This ordinance is hereby declared to be an emergency measure necessary for the urgent benefit and protection of the City and its inhabitants for the reason that the above amendment is necessary immediately in order to protect and promote and substantial governmental interests identified herein; wherefore this ordinance shall take effect immediately upon its passage.

Dated: September 13, 2003

(2)

Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

No. 05-0153

IN THE

Supreme Court of the United States

CITY OF FAIRFIELD, Ohio; KEVIN HADDIX, in his Individual Capacity; JANETTE MATALA, In her individual capacity City of Fairfield Zoning Inspector; JOHN DOES(S) 2-5, in their individual capacities, PETITIONERS

v.

LYNN D. TUCKER, JR., General Vice President, International Association of Machinists and Aerospace Workers; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 34

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF OF *AMICI CURIAE* THE CITY OF ATHENS, OHIO, AND THE OHIO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER

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MOTION BY THE OHIO MUNICIPAL LEAGUE FOR LEAVE TO FILE A BRIEF AS AN *AMICUS CURIAE*.

Now comes the Ohio Municipal League,[1] (sometimes, "the League") by and through counsel, and hereby moves this court for leave to participate as an *amicus curiae*, supporting the petition of the City of Fairfield, et al., for a writ of *certiorari*. The League is tendering a brief jointly with the City of Athens, Ohio, which is permitted to file an *amicus curiae* brief as a matter of right, pursuant to Section 4 of Rule 37 of the Rules of the Supreme Court of the United States.

Pursuant to Section 2 of Rule 37 of the Rules of the Supreme Court of the United States, if a prospective *amicus* does not receive the written consent of all parties, the *amicus* must petition the court for leave to file the brief, indicate which party has withheld consent and advise the court of the nature of the movant's interest.

The petitioner, the City of Fairfield, was willing to grant consent, but when the consent of the counsel for respondent in this case, i.e. David M. Cook, was sought by John H. Clemmons, the Law Director for the City of Fairfield, consent was denied.

As the brief of the City of Athens may be filed as a matter of right, the Ohio Municipal League should be permitted to join in that brief in order to express the

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1 No person, other than *amici* and their counsel, participated in the writing of this brief or made any financial contribution to the brief.

combined interests of its members and, thereby, eliminate the need for multiple municipalities to either join with the City of Athens or file their own briefs.

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INTERESTS OF AMICI CURIAE

The City of Athens is a statutory city, organized in the State of Ohio with its structure and operations founded upon the Ohio Revised Code. The city is a duly established, existing Ohio municipal corporation which exercises home rule authority pursuant to Article XVIII, Section 3 of the Ohio Constitution. Section 3 provides that municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

The City of Athens has enacted Athens City Code Section 9.12.17 which states that "No person shall obstruct any street, alley, sidewalk or other public way in the city, by erecting thereon any fence or building, or permitting any fence or building to remain thereon."

The City of Athens has also enacted Athens City Code Section 23.03.13(W)(5) which states that "No sign shall be placed on any curb, sidewalk, post, pole, hydrant, bridge, wall, tree or other surface located on public property or over or across any public street except as expressly authorized by the Mayor."

The Sixth Circuit Court of Appeals, in the instant case, held that the district court did not abuse its discretion in finding that the use of the balloon on the public right-of-way is constitutionally protected expression. The court found that the suppression of Tucker's protected speech constituted irreparable harm to the Union and that the use of the balloon was not shown to harm others.

The consequence of this ruling will be that the City of Athens will be unable to enforce its laws that prohibit obstructions in the City's rights-of-way, if the obstructions contain either written or symbolic messages, are present for a limited duration and are easily removed. The City right-of-ways could become littered with "temporary" structures if those structures convey a message.

The Ohio Municipal League is an Ohio non-profit corporation whose membership includes over 750 cities and villages in the State of Ohio. Most, perhaps all, of the League's members prohibit (with certain exceptions) the erection of private structures within public rights-of-way. The erroneous decision of the Sixth Circuit, if applied on a routine basis, severely restricts the ability of municipalities to enforce content neutral regulations which advance the legitimate governmental interests of keeping the right-of-way unobstructed, thereby promoting public safety.

Municipalities across Ohio have ordinances similar to those of the Cities of Athens and Fairfield, which prohibit erecting structures and signs in public rights-of-way. As a consequence of the Sixth Circuit's ruling, all Ohio municipalities face a severe limit on their abilities to regulate activity in the public rights-of-way, which will adversely affect the safety of people using those rights-of-way.

INTRODUCTION: SUMMARY OF ARGUMENT

Any driver whose vision has been blocked while trying to enter a busy highway knows the reason why people should not be allowed to erect structures in

municipal rights-of-way. Keeping this in mind, this case is really **not** about the freedom of speech; it is about being able to see what's coming at you at a high rate of speed before you pull out in front of it.

The legislative authority of the City of Fairfield has enacted legislation establishing a policy that the rights-of-way of the City should not have structures located in them, either on a permanent or temporary basis.[1] This regulation is content neutral, it advances the public's safety, and leaves innumerable other avenues for expression. Pursuant to well established law, the ordinance should be found to be constitutional as applied to respondents.

The United States Court of Appeals for the Sixth Circuit, on a vote of 2-1, has determined that the United States Constitution requires the City to permit structures to be located in the City's rights-of-way for at least two (2) hours, so long as the structures are used for the purpose of First Amendment-protected communications and so long as they may be "easily removed."

The *amici* believe the City of Fairfield has done an excellent job explaining the legal reasons why the Sixth Circuit decision is wrong. The *amici*, now, write briefly to bring to this court's attention reasons why the Sixth Circuit's decision should not be permitted to remain good

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2 The ordinance does permit certain exceptions for utility poles, street trees, mailboxes, etc., which are customarily found in the right-of-way and which do not present significant obstructions to drivers seeking to enter the roadway.

law in the circuit. The decision below will create significant safety hazards which greatly outweigh the one mode of "speech" which has been banned by the City of Fairfield.

Certiorari is sought so that this Court may clarify that the Constitution does **not** require municipal regulations, which are content neutral, and which reasonably and narrowly advance legitimate governmental interests, have to be the least-restrictive or least-intrusive means of advancing the legitimate governmental interest.

STATEMENT OF FACTS

The *Amici* hereby adopt, and incorporate by reference, the facts as presented by the Petitioners, the City of Fairfield et al.

ARGUMENT

Amici concur with the legal arguments made by the Petitioners and will not restate them here. *Cf.*, S.Ct. Rule 37.1 ("An *amicus curiae* brief that brings to the attention of the Court relevant matters not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.")

The Sixth Circuit has determined that people in Fairfield have a constitutionally protected right to erect a structure in a municipal right-of-way for not more than

two (2) hours. What cannot be determined from the Court's opinion is any discernable principle which would limit this constitutional "right" to place structures in a right-of-way, so long as the structure is "temporary."

Dissenting Judge Kennedy highlighted this problem with the District Court's (and, by implication, the majority's) jurisprudence:

> "*** The district court indicates that if the Union wished to leave the inflatable rat in the right-of-way constantly, it would reach a different result. Apx.46. What exactly constitutes "an extended period of time" that would require resolving this dispute in the City's favor? *Id.* Four hours? Ten? Twenty four? Alternatively, what public employee is to be given the discretion to determine that amount of time, and how is that discretion to be limited so that time, place, and manner neutrality is maintained?
>
> While I do not want to belabor the line-drawing problem, I raise them simply because I do not believe that the district court's position is a tenable way to evaluate the level of protection the structure deserves. Instead, I believe that we must look to the significant interest and then determine whether the ordinance narrowly targets the identified evil. *Ward*, 491 U.S. at 799-800." *Tucker v. Fairfield*, 398 F.2d 457, at 467.

Is it a constitutional right for picketers to erect a structure in a municipal right-of-way from "dawn to dusk every day except holidays" for over five (5) years,

as has happened in Ohio?
http://hollandsentinel.com/stories/112500/bus_61.html

The Sixth Circuit has not considered the implications of its policy preference to allow "temporary" structures in the right-of-way if the structures can be "easily removed."

Structures in the right-of-way may block the view of vehicles entering the right-of-way, either from private property or other roads, irrespective of the temporal limit or mobility of the structure. In a two hour period an indefinite number of vehicles may have their views of traffic blocked by a "temporary," movable structure. It is not likely that persons in vehicles involved in an accident would be comforted by the fact that the structure which blocked the vision of the driver(s) was only there for two hours and could be easily removed. Is the reduction of sight distance something which must be evaluated on a case by case basis, or does a City have the right to say "no" to structures in the right-of-way?

Beyond the physical act of blocking vision, seeing a giant rat balloon by the road is not an every day occurrence (a proposition seemingly endorsed by the Sixth Circuit's requirement that such a structure must be temporary, but made less likely by the possibility of a protest occurring all day, every day for over five years). Is it fair to assert that seeing a giant rat in the right-of-way might have an effect upon driver attention? The time needed to say "Look, Martha, there's a giant rat!" may be all the time needed to cause a violation of Ohio's assured clear distance law, R.C. 4511.21(A), and a serious accident.

"Temporary," "movable" structures may also force

pedestrians to leave the portion of the right-of-way designed for pedestrian traffic and walk on the portion of the road designed for vehicular traffic, threatening the safety of the pedestrians.

Municipalities ought to be allowed to prohibit structures from being erected in their rights-of-way, even if such a regulation eliminates one method of communication. As petitioner aptly notes: the regulation is content neutral, it is narrowly tailored to meet the governmental interest and plenty of other methods of communication are available to those who wish to be seen and heard. The Fairfield ordinance is, therefore, constitutional. *Ward v. Rock Against Racism*, 491 U.S. 781, 801 ("*** the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in a given case.")

CONCLUSION

The First Amendment cannot **require** municipalities to allow every person to erect a temporary structure in the right-of-way, even if the structure can be easily removed. The Sixth Circuit Court of Appeals' decision mandates such a result. The writ of *certiorari* should be granted. The Sixth Circuit has, in effect, second-guessed a policy decision of a local government in a manner neither required nor permitted by the Constitution. This case is worthy of the time and attention of this Honorable Court.

Respectfully submitted,

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MOTION FILED
AUG 3 1 2005

No. 05-153

In the
Supreme Court of the United States

CITY OF FAIRFIELD, OHIO, ET AL.,
Petitioners,

v.

LYNN D. TUCKER, JR., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER, CITY OF FAIRFIELD, OHIO

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No. 05-153

In the
SUPREME COURT OF THE UNITED STATES

City of Fairfield, Ohio, et al.,

Petitioners,

v.

Lynn D. Tucker, Jr., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Pursuant to this Court's Rule 37.3(b), the *amicus curiae*, International Municipal Lawyers Association ("IMLA"), respectfully requests this Court's leave to file the attached brief in support of the Petitioners. In support of its motion, IMLA states as follows:

1. IMLA requested the consent of the parties to file this brief. Written consent to file this brief was obtained from the Petitioners. The Respondents refused to consent to the filing of this brief.

2. IMLA represents the interests of local governments through out the United States on both legal and policy

issues. IMLA seeks to strengthen and promote local government interests and views on a broad range of issues before the courts and federal elected officials.

3. Local governments routinely face issues of how to regulate the property they hold in trust for the public. These issues include the use of property for protest and demonstration and the use of public property to display non-public signs and structures. As such, local governments' collective interest in this case, as represented by IMLA is great. In addition, principles in this case deal not only with the regulation of public property, but with the application of legal principles generally. The application of the "narrowly tailored" requirement is found in cases involving government property, sign regulation, and business regulation. The "narrowly tailored" requirement affects many local governments on a day to day basis through the application of regulations to government property. The outcome of this case will affect local governments' throughout the United States.

4. This brief presents legal arguments and information supplemental to the Petitioner's brief which will assist the Court in reviewing this matter.

Respectfully submitted,

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Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 641-44 (1991) 6

INTEREST OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

As of 2002, over 87,000 local government units existed in the United States. This number includes 3,034 county governments, 19,431 municipal governments, and 16,506 town and township governments, many of which regulate the placement of signs, structures and other items in their rights of way . *See* U.S. Bureau of Census, Federal State and Local

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 *available at* <http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf >. As a representative association of these local governments, IMLA has a strong interest in this case. The proper application of the "narrowly tailored" analysis in cases reviewing content neutral time, place, and manner regulations is of vital importance to all local governments.

Hence, the *amicus curiae's* interest in this case.

STATEMENT

This case is an "as applied" challenge to a Fairfield, Ohio ordinance governing the placement of structures on the public rights of way in Fairfield. This case arises out of incidents taking place on Dixie Highway in Fairfield, Ohio, a city with a population of just over 40,000 people. On three occasions, the Respondents set up a rat balloon in the right of way along side Dixie Highway to use as part of their demonstration. On each occasion, they were warned that inflating the balloon and attaching it to the ground violated Fairfield's ordinance against structures in the public right of way. It was not until the third instance of erecting the balloon that the Respondent was ticketed.

Dixie Highway is like many highways throughout the United States. However, it is important to visualize the physical area where the dispute is centered because the public right of way is not equivalent to the parks and streets that have often figured so prominently in this Court's First Amendment cases. *See*, *Davis v. Massachusetts*, 167 U.S. 43 (1897), *Cox v. New Hampshire*, 312 U.S. 569 (1941), *Niemotko v. Maryland*, 340 U.S. 268, 279 (1951), *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,

466 U.S. 789 (1984), *Frisby v. Schulz*, 487 U.S. 474, 485-86 (1988). Dixie Highway connects several communities in Ohio and is lined with a variety of small retail establishments, strip malls, car dealerships, and "fast food" restaurants, especially where it enters populated areas like Fairfield. It is a four lane highway, sometimes with a center turn lane, and speed limits are generally set at 55 miles per hour, though as the highway travels through towns and cities along its route, its limit fluctuates. In 1998, estimates of vehicular traffic concluded some 40,000 cars per day traveled on Dixie Highway – a significant number of trips. *See*, Amy Higgins, *Ohio 4 Study: How Much is Too Much*, The Cincinnati Inquirer, Nov. 12, 1998 available at <http://www/enquirer.com/editions/1998/11/12/route4study.html>.

The particular portion of Dixie Highway at issue in this case has approximately a thirty foot grass embankment separating the four lane highway from Fairfield Ford, the business the Respondents were picketing. There is no sidewalk on this portion of Dixie Highway.

While the parties have litigated this case with the assumption that the public right of way is a public forum, IMLA notes case law suggests the right of way may be a nonpublic forum. See, *Jacobsen v. Illinois Department Of Transportation*, No. 04-1115, 2005 WL 1962784, (7th Cir. August 17, 2005) (rest areas attached to the Nations' Interstate highway system are nonpublic as Interstate system was primarily designed for safe and expeditious travel, not for the free exchange of ideas); *Jacobsen v. Bonine*, 123 F.3d 1272 (9th Cir. 1997) (same); *Sentinel Communications Company v. Watts*, 936 F.2d 1189 (11th Cir. 1991) (same); *Jacobsen v. Howard*, 109 F.3d 1268 (8th Cir. 1997) (assuming without deciding that interstate rest areas are nonpublic fora); *Brown v. California Department Of*

Transportation, 321 F.3d 1217 (9th Cir. 2003) (highway overpass fence not a public forum); *State Of Texas v. Knights Of The Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) ("The Texas highways exist for the purpose of facilitating movement around the state. The State does not act unreasonably when it prohibits speech which would interfere with that function."); *but cf.*, *Faustin v. City And County Of Denver, Colorado*, 268 F.3d 942 (10th Cir. 2001) (sidewalk on highway overpass linking sidewalk on parallel streets constituted a public forum). In fact, the characterization of a place as physically a street, sidewalk, or park, without more, is not adequate to define a traditional public forum. *See United States v. Kokinda*, 497 U.S. 720, 727, (1990) (plurality opinion) ("The mere physical characteristics of the property cannot dictate forum analysis"). *See also*, *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (only streets, sidewalks, and parks have been identified as traditional public fora and then only when the street, sidewalk, or park has been dedicated to the "free exchange of ideas."); *United States v. Kokinda*, 497 U.S. 720, 728-729 (1990) (sidewalk to postal facility entrance not a public forum, "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum").

If the public right of way were not considered a public forum, the regulation at issue would only need to meet rational basis review – the regulation must be viewpoint neutral and reasonable in light of the purpose of the forum and the surrounding circumstances. *Cornelius*, 473 U.S. at 800 (1985).

ARGUMENT

The *amici* urge this Court to accept *certiorari* in this case for two reasons. First, the issue is one of great importance to local governments through out the United States and involves an important question of federal law needing guidance from this Court. Second, the Sixth Circuit's decision is contrary to this Court's precedent.

I. THE "NARROWLY TAILORED" STANDARD NEEDS REFINEMENT FROM THIS COURT

In First Amendment jurisprudence, content neutral time, place, and manner regulations survive constitutional scrutiny if they are 1) narrowly tailored; 2) serve a significant or substantial government interest; and 3) leave open ample alternate channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). However, courts have little guidance on how to determine whether a regulation is "narrowly tailored."

In discussing *Hill v. Colorado*, 530 U.S. 703 (2000), a commentator states that this Court's analysis was complicated because of earlier cases which applied the "narrowly tailored" doctrine inconsistently. *The Supreme Court 1999 - Term Leading Cases*, 114 Harv. L. Rev. 289, 295 (Nov. 2000). Noting that content neutral time, place and manner restrictions need not be so narrowly tailored as to meet strict scrutiny, the author states "the precise contours of this less rigorous standard remain undefined." *Id.* The author notes that in some instances "narrow tailoring" has been considered a form of intermediate scrutiny by this Court and lower courts. *Id.* at n.53 (collecting references).

On the other hand, the author notes conflicting instances where "narrow tailoring" has been treated as little more than rational basis review by this Court and lower courts. *Id.* at n.54 (collecting references). *See also*, Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1249-50, 1260-70 (1995) (stating that "contemporary First Amendment doctrine is ...striking chiefly for its superficiality, its internal incoherence, [and] its distressing failure to facilitate constructive judicial engagement," and highlighting the Court's treatment of the narrow tailoring portion of the time, place, and manner test as exemplary of these problems); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 641-44 (1991) (discussing the various approaches to the narrow tailoring test adopted by courts and the controversy that has resulted); Matthew D. Bunker, Emily Erickson, *The Jurisprudence Of Precision: Contrast Space And Narrow Tailoring In First Amendment Doctrine, Communication Law and Policy*, Spring, 2001 page 259 ("The United States Supreme Court often requires that laws regulating free speech be narrowly tailored. The narrow tailoring requirement lacks analytical rigor in the Court's opinions, however.")

Even *Ward*, the case most frequently cited as the guidepost on narrow tailoring contains contradictory and confusing guidance. *See*, 114 Harv. L. Rev. at 295, & n.56. In *Ward*, the Court stated both that narrow tailoring is satisfied if a "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," *Ward*, 491 U.S. at 799, and that the "essence of narrow tailoring" is that a regulation must "eliminate [the evils that it purports to address] without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7. The *Ward* court also stated, "Government may not

regulate expression in such a manner that a *substantial* portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799, (emphasis added).

Similarly, in *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), this Court stated "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Each of these statements falls on a continuum of analysis indicating that a narrowly tailored regulation is one that, on one end of the spectrum, promotes a substantial government interest that would be achieved less effectively absent the regulation, while on the other end of the spectrum the regulation targets and eliminates no more than the exact evil it seeks to eliminate.

As the above discussion shows, the commentators recognize the "narrow tailoring" test is in need of further refinement by this Court. The confusion in this area led the Sixth Circuit to erroneously rule that the Fairfield, Ohio ordinance was not narrowly tailored. The more than 30,000 local governments in the United States would benefit greatly if this Court would accept certiorari in this case to provide additional guidance on how to structure an ordinance that is narrowly tailored and on how courts should engage in a proper analysis under this test. For this reason, the International Municipal Lawyers Association respectfully requests that this Court grant the City's petition for certiorari.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

As noted above, the "narrow tailoring" prong for analyzing the constitutionality of content neutral time, place, and manner regulations is in need of further refinement. An additional factor in favor of granting certiorari in this case is

the fact that the Sixth Circuit misapplied this Court's teachings.

The International Municipal Lawyers Association agrees with and adopts the City of Fairfield's position and arguments with respect to the proper application of the narrowly tailored analysis. *See*, Pet. at 15-27. Additionally, IMLA notes that the Sixth Circuit, in conflict with this Court's guidance, erred when it substituted its judgment of the need for application of the ordinance in this case for the judgment of the City.

> *In our view*, the asserted government interests of keeping the public right-of-way clear and preserving aesthetics of the community, while generally considered substantially, are simply not achieved any less effectively absent the application of the ordinance in this case.

Pet. App. at 10a. Emphasis added.

This Court has counseled against substituting judicial views for those of the legislators charged with making decisions for communities. Although courts must independently evaluate legislative findings in performing their constitutional review, this evaluation "is not a license . . . to replace the [legislature's] factual predictions with [the court's] own." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994). In this instance, the City determined that allowing structures in the right of way, now matter how temporary, interfered with the smooth and safe flow of traffic, and interfered with the aesthetic standards the City wished to enforce for its citizens. The Sixth Circuit, however, substituting its judgment, determined that a structure which was present for only a few hours at a time would not

adversely affect either of these interests. That conclusion was not proper for the Sixth Circuit to make.

The Sixth Circuit also faulted the City for a perceived lack of evidence that any adverse effect had actually occurred due to the temporary presence of the balloon.

> There is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right of way has any adverse effect, such as obstruction of pedestrian or automobile traffic.

Pet. App. at 10a. However, this was an improper basis for the court's ruling. The City need not wait for the balloon to cause a traffic obstruction before it can prohibit its presence in the right of way. The City need not wait for one or more of the 40,000 automobile trips along Dixie Highway to result in an accident caused by driver distraction induced by a giant rat balloon before it can prohibit structures, whether permanent or temporary, in the right of way. "[S]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc,* 512 U.S. at 665 (1994). The City could legitimately determine that structures in the right of way could adversely affect the safety of drivers and automobiles on Dixie Highway. In fact, temporary structures could well cause more concern for the City and drivers because of their limited duration, making these structures especially noticeable and distracting as a result of being out of the ordinary for a commute along Dixie Highway. The Sixth Circuit was incorrect when it ruled that a lack of objective evidence of obstruction and harm was required to sustain the ordinance in this case.

Lastly, the Sixth Circuit's ruling opens local governments to claims that ordinances are enacted arbitrarily – for how can a local government decide at what point a temporary structure, like a 12 foot high rat balloon, becomes a threat to safety and aesthetics – at 3 hours, 4 hours, 8 hours, 3 days? Perhaps this decision will be governed by the particular facts surrounding each structure, in which case local governments face having their ordinances invalidated because the officials charged with enforcing them have unfettered discretion to decide which structures are allowed and which are not. This result cannot be correct under this Court's teachings.

CONCLUSION

For these reasons, the *amici* respectfully urge this Court to grant the City of Fairfield's petition for certiorari.

Respectfully submitted,

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